

# Chapter 242-02 WAC

## Practice and procedure

(Discussion Draft - November 2, 2010)

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### ADMINISTRATION

#### 242-02-010 Organization.

The growth management hearings board was established pursuant to chapter 36.70A RCW. The board is an independent quasi-judicial agency of the state of Washington with seven members appointed by the governor who are qualified by experience or training in matters pertaining to land use planning. These rules were developed, adopted, and amended by the board pursuant to RCW 36.70A.270(7). They should be read in conjunction with the act and the Administrative Procedure Act, chapter 34.05 RCW.

#### 242-02-015 Regional panels.

(1) Each petition for review that is filed with the growth management hearings board shall be heard and decided by a regional panel of growth management hearings board members. Regional panels shall be constituted as follows:

(a) Central Puget Sound region. A three-member Central Puget Sound panel shall be selected to hear matters pertaining to cities and counties located within the region comprised of King, Pierce, Snohomish, and Kitsap counties.

(b) Eastern Washington region. A three-member Eastern Washington panel shall be selected to hear matters pertaining to cities and ~~thirty-two~~ counties that are required or choose to plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains.

(c) Western Washington region. A three-member Western Washington panel shall be selected to hear matters pertaining to cities and counties that are required or choose to plan under RCW 36.70A.040, are located west of the crest of the Cascade mountains, and are not included in the Central Puget Sound region. Skamania County, if it is required or chooses to plan under RCW 36.70A.040, may elect to be included within either the Western Washington region or the Eastern Washington region.

(2)(a) Each regional panel selected to hear and decide cases shall consist of three board members, at least a majority of whom shall reside within the region in which the case arose, unless such regional members cannot sit on a particular case because of recusal or disqualification, ~~or unless the board administrative officer determines that there is an emergency including, but not limited to, the unavailability of a board member due to illness, absence, vacancy, or significant workload imbalance.~~

~~(b) The presiding officer of each case shall reside within the region in which the case arose, unless the board administrative officer determines that there is an emergency.~~

~~(b)(c) Except as provided otherwise in (b) of this subsection, e~~Each regional panel must:

- (i) Include one member admitted to practice law in this state;
- (ii) Include one member who has been a city or county elected official; and
- (iii) Reflect the political composition of the board. ~~The requirements of (b) of this subsection may be waived by the board administrative officer due to member unavailability, significant workload imbalances, or other reasons.~~

(d) The requirements of subsection (a), (b), and (c) of this subsection may be waived by the board administrative officer if the administrative officer determines that there is an emergency, including but not limited to, unavailability of a board member due to absence, vacancy, or significant workload imbalance.

**COMMENT:** Delete incorrect number of counties in 1(b). Proposed amendments provide flexibility in event opt-out is allowed; deletes redundant references to waiver of panel requirements by administrative officer and includes the waiver authority in new subsection 2(d). Proposed amendments also clarifies the language of former 2(b) by separating it into proposed 2(c) and 2(d).

Statutory authority – RCW 36.70A.270(7) (Rule adoption), .250 and .260 Board structure/administration

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242-02-020

Function —~~Local deference.~~

(1) The function of the board is to make informed decisions on appeals arising from implementation of the Growth Management Act in a clear, consistent, timely, and impartial manner that recognizes regional diversity.

~~(2) The legislature requires growth management planning to occur in compliance with the goals and requirements of the act. The responsibility for managing local growth and shaping a county's or city's future rests with the local community. The board will grant deference to counties and cities in how they plan for and manage growth.~~

**COMMENT:** Subsection 2 is a statutory requirement, not a procedure. If the Board were to retain this subsection, it should read as follows:

**(2) The legislature requires growth management planning to occur in compliance with the goals and requirements of the act. The responsibility for managing local growth and shaping a county's or city's future rests with the local community. The board will grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of the act.**

Statutory authority – RCW 36.70A.270(7) (Rule adoption), .280 and .3201 Board deference/standard of review

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242-02-030

Jurisdiction.

~~This section is intended to be general and informational only, and failure to list matters over which the board has jurisdiction at law shall not constitute any waiver of or withdrawal from such jurisdiction.~~

~~———— (1) Geographic jurisdiction. Regional Jurisdiction. Each panel shall hear only those matters pertaining to the cities and counties located within its the jurisdictional boundaries of the region as defined in RCW 36.70A.250. The boundaries are as follows:~~

~~———— (a) The Eastern Washington regional panel includes all counties and the cities now or subsequently located within those counties that are required or choose to plan under RCW 36.70A.040 and are located east of the crest of the Cascade mountains;~~

~~———— (b) The Central Puget Sound regional panel includes and is limited to King, Pierce, Snohomish and Kitsap counties, and the cities now or subsequently located within those counties; and~~

~~———— (c) The Western Washington regional panel includes all counties and the cities now or subsequently located within those counties that are required or choose to plan under RCW 36.70A.040 and are located west of the crest of the Cascade mountains and are not included in the Central Puget Sound regional panel boundaries;~~

~~———— (d) Skamania County, should it be required or choose to plan under RCW 36.70A.040, may elect to be included within the jurisdictional boundaries of the Western or Eastern Washington regional panels.~~

(2) Subject matter jurisdiction. The board shall hear and determine petitions alleging that a state agency, county, or city is not in compliance with the requirements of the act, or chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to plans, development regulations, and amendments adopted under the act or chapter 90.58 RCW; or, petitions from cities or the governor relating to an adopted county-wide planning policy; or, that the twenty-year growth management planning projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.

~~(3) Jurisdictional issues. Any party to a proceeding before the board and its regional panel may, by motion, challenge the jurisdiction of the panel in any petition for review. The board may, upon its own motion, raise such an issue.~~

**COMMENT:** Proposed amendments delete regional boundaries information which is contained in WAC 242-02-015. Subsection 3 will be moved under the WAC provisions related to Motions.

Alternatively, the Board could divide this provision – putting geographic (regional) jurisdiction in one section and subject matter jurisdiction/right to challenge in another WAC provision.

Statutory authority: RCW 36.70A.270(7), .260, .280(1)

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242-02-040

Definitions.

As used in this title, the following terms shall have the following meaning:

- (1) "Act" means the Growth Management Act, chapter 36.70A RCW, and subsequent amendments.
- (2) "Administrative Officer" means the person annually elected by the board pursuant to RCW 36.70A.270(10) to handle day-to-day administrative, budget, and personnel matters on behalf of the board and to make case assignments to board members in accordance with the board's rules of procedure.
- (3) "Board" means the growth management hearings board or a panel of the board hearing a matter as established by RCW 36.70A.260.
- (4) "Compliance participant" means any person with standing to challenge legislation taken in response to a board order, as provided in RCW 36.70A.330(2).
- (5) "Consolidation" means the combining of all petitions involving review of the same comprehensive plan or development regulation into a single case for hearing and decision, as provided in RCW 36.70A.290(5).
- (6) "Coordination" means provision of parallel case schedules for cases involving related matters in the interest of efficient resolution.
- (7) "Ex parte communication" is communication about issues in a pending case between a party and a board member without including all other parties to the matter. Ex parte communication is prohibited.
- (8) "Filing" of a document means actual receipt by the board during regular office hours, as specific in WAC 242-02-230 (for a petition for review) or WAC 242-02-240 [proposed] (for all other documents).
- ~~(9)(3)~~ "Final decision" means:
  - (a) Any final order as provided in RCW 36.70A.300; or
  - (b) Any other written finding, determination or order of the board which finally determines a legal right, duty, or other legal interest of the parties in the case and which clearly states such written finding, determination or order ~~that it~~ is a final decision subject to appeal to superior court.
- ~~(4) "Hearing examiner" means an authorized agent of a board who has a demonstrated knowledge of land use planning and law, appointed to assist the board in the performance of its hearing function as delegated by the board as provided by the act.~~
- ~~(5)(10)~~ "Office of the growth management hearings board" means the administrative office of the board established pursuant to RCW 36.70A.270(2).
- (11) "Panel" means the three board members assigned to hear and decide a particular case pursuant to RCW 36.70A.260.
- ~~(6) "Participant" means any person with standing to challenge a legislative action as set forth in RCW 36.70A.330(2).~~
- ~~(7)(12)~~ "Party" means any person named in the caption of a case before the board: the petitioner(s) and respondent(s) in a case before the board and, if admitted in the case, intervenor(s), amicus, and compliance participant(s).
- ~~(8)(13)~~ "Person" means any individual, partnership, corporation, association, state agency, governmental subdivision or unit, or public or private organization or entity of any character.

~~(14)~~ (9) "Petitioner" means a person who ~~appeals any matter or who brings a petition for rule making to the board. A petitioner is a party to a case before the board~~ files a petition for review pursuant to RCW 36.70A.290 or who brings a petition for rulemaking to the board.

~~(10)~~ (15) "Presiding officer" means any member of the board, ~~or a hearing examiner~~, who is assigned designated to conduct a conference or hearing as directed by the board. The presiding officer shall be designated pursuant to WAC 242-02-521 and have authority as provided by WAC 242-02-522.

~~(14)~~ (16) "Publication" means:

(a) For a city, the date the city publishes the ordinance or summary of the ordinance adopting a comprehensive plan, development regulations or subsequent amendment, as is required to be published, or the date the city publishes notice that the shoreline master program or amendment has been approved or disapproved by the department of ecology;

(b) For a county, the date the county publishes the notice that it has adopted a comprehensive plan, development regulations or other enactments, or subsequent amendments pursuant to RCW 36.70A.290(2), or the date the county publishes notice that the shoreline master program or amendment has been approved or disapproved by the department of ecology.

~~(12)~~ (17) "Respondent" means ~~a person who is named as a responding party in any petition for review before the board~~ the city, county, or state agency whose action is challenged in a petition for review before the board.

(18) "Service" of a document means delivery of the document to the other parties to the appeal, as specified in WAC 242-02-230 (for the petition for review) or WAC 242-02-240~~proposed~~ (for all other documents).

#### **COMMENT:**

**Definition of Board:** Should the rules always say "panel" to refer to a 3-member group of the board handling a case or should the rules simply refer to the "board"? This would be consistent with how the Court of Appeals calls itself "the court" even when it is working as a 3-member panel. Practitioners interviewed were generally comfortable with reference to the "board" rather than "panel" throughout the rules.

**Definition of Compliance Participant:** Proposed amendment is intended to call this individual(s) a "compliance" participant rather than just a participant, based on WAC 242-02-89201

**Definition of Hearing Examiner:** This section deleted but a new section, proposed WAC 242-02-430, will address hearing examiners

**Definition of Party and Respondent:** It should be noted that the definition of party and respondent generated a lot of requests for clarification from practitioners.

There has been a lot of input from practitioners about how "parties" is defined. The Board needs as much clarity as possible about who is a party of record, especially since some of the cases have long and circuitous lives.

**Definition of Filing and Service.** The PCHB WACs define filing and service in their definition section rather than having separate rules for filing and service (see WAC 371-08-305); proposed amendments in this regard may be helpful to *pro se* parties.

Statutory authority: RCW 36.70A.270(7) plus a variety of GMA provisions

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## 242-02-050 Rules.

These rules shall govern the board's adoption or amendment of rules, and all practice and procedure for hearings before the board. Where a time frame is different in these rules from those in chapter 10-08 WAC, it is because the board is required to act pursuant to the time frames set forth in the act.

**COMMENT:** WAC 10-08 is the Model Rules of Procedure for the Office of Administrative Hearings

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242-02-052

Petition for rule making.

**OPTION No. 1: Retain existing language but reformat 2(b) by setting each subsection in a numbered paragraph**

(1) Right to petition for rule making. Any person may petition the board for the adoption, amendment, or repeal of any rule. Said petition shall be filed with the board at its office.

(2) Form of petition. The form of the petition for adoption, amendment, or repeal of any rule shall generally adhere to the following:

(a) A caption in the following form:

BEFORE THE GROWTH MANAGEMENT  
HEARINGS BOARD  
STATE OF WASHINGTON

No.  
In the matter of  
the Petition of \_\_\_\_\_ petition for rule making  
(Name of Petitioner)  
for Rule Making

(b) The body of the petition shall be set out in numbered paragraphs.

(i) The first paragraph shall state the name and address of the petitioning party and whether the petitioner seeks the adoption of a new rule or rules, or amendment or repeal of an existing rule or rules.

(ii) The second paragraph, in case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety. Where the petition is for repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by board rule number.

(iii) The third paragraph shall set forth concisely the reasons for the proposal of the petitioner and shall contain a statement as to the interests of the petitioner and the subject matter of the rule.

(iv) Additional numbered paragraphs may be used to give full explanation of petitioner's reason for the action sought.

(c) The petition shall be dated and signed by the party named in the first paragraph or by the petitioner's attorney or other authorized representative. The original and nine copies shall be filed with the board.

**OPTION No. 2: Delete existing language and replace with the following:**

Any person may petition the board requesting the adoption, amendment, or repeal of any rule. The format for such petition; the criteria to be addressed; and the procedure for submission, consideration, and disposition shall be as required in RCW 34.05.330(1).

(1) Right to petition for rule making. Any person may petition the board for the adoption, amendment, or repeal of any rule. Said petition shall be filed with the board at its office.

(2) Form of petition. The form of the petition for adoption, amendment, or repeal of any rule shall generally adhere to the following:

(a) A caption in the following form:

BEFORE THE GROWTH MANAGEMENT  
HEARINGS BOARD  
STATE OF WASHINGTON

No.  
In the matter of  
the Petition of \_\_\_\_\_ petition for rule making  
(Name of Petitioner)

for Rule-Making

~~\_\_\_\_\_ (b) The body of the petition shall be set out in numbered paragraphs. The first paragraph shall state the name and address of the petitioning party and whether the petitioner seeks the adoption of a new rule or rules, or amendment or repeal of an existing rule or rules. The second paragraph, in case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety. Where the petition is for repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by board rule number. The third paragraph shall set forth concisely the reasons for the proposal of the petitioner and shall contain a statement as to the interests of the petitioner and the subject matter of the rule. Additional numbered paragraphs may be used to give full explanation of petitioner's reason for the action sought.~~  
~~\_\_\_\_\_ (c) The petition shall be dated and signed by the party named in the first paragraph or by the petitioner's attorney or other authorized representative. The original and nine copies shall be filed with the board.~~

**COMMENT:** The APA process, as set forth in RCW 34.05.330, is the process for petitions for rulemaking and this states that OFM will provide a form. Do the Board rules need to include a form for the petition if OFM provides? Is reference to APA requirements sufficient?

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242-02-054

Petition for rule making — Consideration and disposition.

~~(1) Upon receipt of aEach petition for the adoption, amendment, or repeal of a rule, shall be considered by the board and the board may, in its discretion, solicit comments, or invite discussion, and hold meetings concerning the matter prior to disposition of the petition.~~

~~(2) Consideration of petitions. All petitions shall be considered by the board and the board may, in its discretion, hold meetings for the further consideration and discussion of the requested adoption, amendment, or repeal of any rule.~~

~~(3) Notification of disposition of petition. The board or designated representatives shall notify the petitioner within a reasonable time of the disposition, if any, of the petition. Within 60 days after submission of a petition for rulemaking, the board shall either:~~

~~(a) deny the petition in writing, stating (i) its reasons for the denial, specifically addressing the concerns raised by the petitioner and, where appropriate, (ii) the alternative means by which it will address the concerns raised by the petitioner or,~~

~~(b) initiate rule-making proceedings in accordance with RCW 34.05.230.~~

**COMMENT:** Existing subsection (2) is deleted due to redundancy. This rule is not very precise as to the process, thus the proposed language parallels that of the APA.

Statutory authority: RCW 36.70A.270(7), 34.05.330(1)

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242-02-060

Computation of time.

The time within which any act shall be done, as provided by these rules, shall be computed by excluding the first day and including the last, unless the last day is a Saturday, Sunday, ~~or a~~ legal holiday, pursuant to RCW 1.16.050, or a state-imposed furlough day, and then it is excluded and the next succeeding day which is neither a Saturday, Sunday, ~~nor a~~ legal holiday, nor furlough day is included. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, ~~and~~ legal holidays, or furlough days shall be excluded in the computation.

**COMMENT:** Is it reasonable to assume that the likelihood of the continued imposition of furlough days justifies clarifying the Board's rules?

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242-02-070

Quorum.

(1) Board quorum. For the purpose of adopting, amending, or repealing these rules or transacting other administrative business, at least four members of the board shall constitute a quorum of the board. A quorum being present, any action may be taken upon the vote of the majority of the board members.

(2) Panel quorum. For purposes of making orders or decisions in a case, two members of a panel shall constitute a quorum and may act even though one panel member is absent. One member ~~or designated hearing examiner~~ may hold ~~conferences or~~ hearings ~~and take testimony~~. The findings of such member ~~or hearing examiner~~ shall not become final until approved by a majority of the panel. A panel member who does not attend a hearing shall review a transcript or recording of the hearing before signing the decision.

**COMMENT:** Deletes reference to hearing examiner and testimony.

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242-02-072

Board office.

(1) The administration of the board is consolidated in one office - the office of the growth management hearings board:

Growth Management Hearings Board  
319 - 7th Avenue S.E., Suite 103  
Olympia, WA 98501  
P.O. Box 40953  
Olympia, WA 98504-0953  
360-586-0260  
360-664-8975 Fax  
e-mail: [eastern@ew.gmhb.wa.gov](mailto:eastern@ew.gmhb.wa.gov)  
e-mail: [western@wwgmhb.wa.gov](mailto:western@wwgmhb.wa.gov)  
e-mail: [central@cps.gmhb.wa.gov](mailto:central@cps.gmhb.wa.gov)  
web site: [www.gmhb.wa.gov](http://www.gmhb.wa.gov)

(2) The filing of all petitions, briefs, exhibits, and other documents related to any proceeding before an individual board shall be made to the office of the growth management hearings board with specific indication of the appropriate regional panel's name - Eastern, Western, or Central Puget Sound.

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242-02-074

Regular meetings.

(1) Regular meetings of the board will be held at the office of the growth management hearings board or a designated location on the first Wednesday of each month at 10:00 a.m. or following any scheduled hearing on that date. Meetings may be held telephonically.

(2) The board shall meet annually at a time and location to be announced.

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242-02-075

Special meeting.

(1) A special meeting of the board may be called at the request of any two of the board members. To call a special meeting, a written notice of the meeting shall be posted on the board's web site and personally e-mailed to:

(a) Each member of the board and

(b) Each general circulation newspaper, television or radio station which has on file with the board a written request to be notified of special meetings.

(2) The written notice shall state the date and time of the meeting, and shall specify the business to be transacted by the board. The board will not take final action on any matter that is not specified in the written notice.

(3) Notices of special meetings shall be sent by e-mail:

(a) One day (twenty-four hours) before the scheduled meeting; except



- (b) When a special meeting is called to consider rule changes pursuant to chapter 34.05 RCW, the notice shall be sent at least twenty days prior to the meeting; and except
- (c) In the event of an emergency requiring board action, the notice and timing requirements may be waived as provided in RCW 42.30.080.
- (4) The special meeting shall be chaired by the administrative officer.
- (5) A special meeting may be held by telephone conference call.
- (6) Members of the public may attend a special meeting by appearing at the board office or the location of the special meeting, at the date and time set for the meeting.

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## 242-02-076

### Annual and semiannual joint boards meetings.

- (1) The annual board meeting will be held on the first Thursday and first Friday of October of each year. The annual meeting will be held in person.
- (a) In odd-numbered years the annual board meeting will be held within the Central Puget Sound region.
- (b) In even-numbered years the annual board meeting will be held within the Eastern Washington region.
- (c) The location, time and agenda for the annual board meeting will be posted on the board's web site ([www.gmhba.wa.gov](http://www.gmhba.wa.gov)) in September of each year.
- (2) The semiannual board meeting will be held on the last Thursday in April each year. The semiannual meeting will be held in person.
- (a) Each year the semiannual board meeting will be held within the Western Washington region.
- (b) The location, time and agenda for the semiannual board meeting will be posted on the board's web site ([www.gmhba.wa.gov](http://www.gmhba.wa.gov)) in March of each year.

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## 242-02-080

### Form and size of documents.

Documents, other than exhibits, shall be provided in the manner indicated in the board's prehearing order.

**COMMENT:** Some parties have requested that submittal of documents may be on computer disc. If allowed, this could be addressed in the Prehearing Order.

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## 242-02-090

### Case numbering.

The board shall assign a case number to each petition for review which shall be the official reference number for purposes of identification. The first two digits of the case number shall correspond to the last two digits of the calendar year in which the petition was filed. The third digit shall designate which regional panel has jurisdiction over the matter. The Eastern Washington panel shall use the digit "1"; the Western Washington panel shall use the digit "2"; and the Central Puget Sound panel shall use the digit "3." The last four digits shall be numbered sequentially in order of receipt. Consolidated cases are generally assigned the number of the last-filed petition followed by a "c".

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## PRACTICE BEFORE ~~A~~ THE BOARD

## 242-02-110

### Appearance and practice before the board — Who may appear.

Practice before the board shall be open to the following persons who have met the standing requirements of chapter 36.70A RCW:



(1) A party or compliance participant to a case before the board may appear personally or, by a duly authorized representative. The duly authorized representative need not be an attorney.;

~~(2) Attorneys at law practicing representing a party before the board must be duly qualified and entitled to practice in the courts of the state of Washington, or satisfy Rule 9 standards; and~~

~~———(3) Other persons permitted by law.~~

**COMMENT:** Deletion of Subsection (3) – “other persons” – who would that encompass?

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242-02-115

### Authorized representatives.

(1) Notice of appearance. Any person acting in a representative capacity on behalf of a party or participant shall file a notice of appearance with the board and shall serve a copy on all other parties. This requirement shall apply to attorneys as well as to other duly authorized representatives of parties.

(2) Substitution. In the event of a change in representative or attorney, a notice of substitution must be filed with the board and a copy served on all other parties before the change in representative shall become effective.

**Statutory authority:** RCW 35.04.428

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242-02-120

### Rules of professional conduct.

~~(1) An attorney~~All persons appearing in proceedings before the board in a representative capacity shall conform to the ~~R~~rules of ~~p~~Professional ~~C~~conduct required of attorneys before the courts of Washington.

~~(2) A person other than an attorney appearing in a representative capacity shall conform to the following standards as set forth in the Rules of Professional Conduct:~~

- ~~(i) Advancing good faith claims and contentions.~~
- ~~(ii) Making reasonable efforts to expedite the proceedings.~~
- ~~(iii) Candor and truthfulness toward the board.~~
- ~~(iv) Fairness to opposing parties, and~~
- ~~(v) Refraining from conduct that is detrimental to the impartiality of the board or the decorum of the proceedings.~~

~~(3) If any such~~ person does not conform to such rules, the board may decline to permit such person to appear in a representative capacity in any current or future proceeding before the board or impose other appropriate sanctions.

**COMMENT:** Many of the RPCs are technical rules for attorneys and not applicable to *pro se* petitioners. The rules of cooperation, truthfulness, and decorum listed above seem to be the ones that apply to board proceedings.

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242-02-130

### Ex parte communication.

No one in a board proceeding shall make or attempt to make any ~~improper~~ ex parte communications with board members, ~~hearing examiners, or presiding officers,~~ regarding any issue in the proceeding that is prohibited by the Administrative Procedure Act, RCW 34.05.455. Communications on purely procedural matters such as scheduling and logistics ~~are permitted on an ex parte basis should be directed to the board's administrative staff. Any person who attempts.~~ ~~Attempts by anyone to make prohibited ex parte communications on behalf of a party may be subject to sanctions pursuant to~~ shall subject such person to the provisions of WAC 242-02-120 and 242-02-720.

**Statutory Authority:** RCW 34.05.455

242-02-140

### Signing of pleadings, motions, and legal memoranda.

Every pleading, motion and legal memorandum of a party shall be dated and signed by the party, or the party's attorney or other authorized representative and include an address, telephone and fax numbers, and electronic mail address.

**COMMENT:** Does the Board want to allow "electronic" signatures? If so, alternative language:

Electronic signature shall be allowed in the manner allowed by the superior court.

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242-02-150

### Teleconference proceeding.

(1) At the discretion of the board or a presiding officer, or where the parties agree and where the rights of the parties will not be prejudiced, all or part of any hearing, prehearing, or motion hearing may be conducted by telephone, television video conference, or other electronic means. Each party in the proceeding must have an opportunity to participate effectively in, to hear, and if technically and economically feasible, to see the entire proceeding while it is taking place.

(2) The board may require documentary evidence, motions, and briefs to be submitted sufficiently in advance of the teleconference proceeding to insure fair consideration and presentation of the issues. All such material shall also be served on other parties at the time of filing with the board.

(3) To the extent the hearing is conducted by teleconference, video conference, or other electronic means, the hearing is open to public observation. The availability of public observation is satisfied by affording members of the public an opportunity, at reasonable times, to hear or inspect the board's record, and to inspect any transcript obtained by the board.

**COMMENT:** The provision for "public observation" comes from the APA - RCW 34.05.449(5). It may be sufficient to include this is WAC 242-04 Board's public disclosure rules.

Statutory authority: RCW 34.05.431(2), .449

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## APPEAL PROCEDURE

**COMMENT AS TO SERVICE/FILING** Procedures of WAC 242-02-200/300:

Many stakeholders, including seasoned attorneys, say that the GMHB rules on filing and service are unclear. Rules for filing and serving the PFR (currently in -220 to-240) need to be clearly distinguished from filing and service of all other papers (currently in -310 to -330). In these proposed rule amendments, the provisions are reordered in the same section. Another option, which is denoted in WAC 242-02-040 Definitions, is to define "filing" with the board and "service" on other parties similar to the PCHB Rules at WAC 371-08-305.

### NEW SECTION 242-02-XXX [Potentially -200]

#### Initiating an Appeal with the Board

**OPTION A – Filing Only:** An appeal before the board is initiated by filing a petition for review with the board at the growth management board office. For the board to acquire jurisdiction such filing must be timely accomplished.

**OPTION B – Filing and Service:** An appeal before the board is initiated by filing a petition for review with the board at the growth management board office and by serving a copy of the petition for review on the city, county, or state agency whose legislative action is being appealed. For the board to acquire jurisdiction both such filing and such service must be timely accomplished.

**COMMENT:** This language comes from the PCHB rules (WAC 371-08-335(1)). The options presented in this section are intended to be clearer, with an opening statement about initiating the appeal, timeliness, and jurisdiction. The GMA is clear that the local jurisdiction is the responding party but does not provide rules for service. The Board's rules are based on the legal concept, well established in civil practice, that a case is initiated by filing and service, both processes required to be within the applicable statute of limitation, but "substantial compliance" applicable to service.

242-02-210

## Petition for review — Forms — Contents.

A petition for review shall substantially contain:

(1) A caption in the following form:

BEFORE THE . . . GROWTH MANAGEMENT					
HEARINGS BOARD					
STATE OF WASHINGTON					
Petitioner,					Case No.
	v.				
Respondent.					PETITION FOR REVIEW

(2) Numbered paragraphs stating:

(a) Petitioner's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other authorized representative, if any;

(b) Date of the challenged order, determination, publication, or other action or, in the case of an alleged failure to act, the date by which the action was required to be taken;

(c) A detailed statement of the issues presented for resolution by the board that specifies the provision of the act or other statute allegedly being violated and, if applicable, the provision of the document that is being appealed;

(d) A statement specifying the type and the basis of the petitioner's standing before the board pursuant to RCW [36.70A.280\(2\)](#);

~~(e) The estimated length of the hearing;~~

~~(e)~~(f) The relief sought, including the specific nature and extent;

(g) A statement that the petitioner has read the petition for review and believes the contents to be true, followed by the petitioner's signature or signature of the attorney(s) or other authorized representative(s), if any.

(3) One copy of the applicable provisions of the document being appealed, if any, shall be attached to the petition for review. Petitioner shall provide the board with a copy of the entire document being appealed within thirty days of filing a petition for review, unless otherwise directed by the board.

**Statutory Authority:** RCW 36.70A.290(1)

**COMMENT:** Should this section be further expanded or a sub-section provided in regards to specificity of issue statements? If so, suggested language:

- Brief statement of basis in the record that supports the allegations, or
- Identification of the specific section/subsection of the GMA that is violated by the specific section/subsection of the challenged legislation.

Some practitioners complained of issue statements that were not specific enough to give the respondent fair warning of the arguments likely to be raised. Other practitioners complained that requiring issue statements to be too detailed and specific sets up a game of “gotcha” where the FDO may miss the substance of the petition while parsing the issue statement.

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242-02-220

Petition for review — Time for filing.

(1) A petition relating to whether or not an adopted comprehensive plan, development regulation, shoreline master program or subsequent amendments, is in compliance with the goals and requirements of the act or chapter 90.58 or 43.21C RCW shall be filed with the board within sixty days from the date of publication by the legislative body of the county or city as specified by RCW 36.70A.290(2).

(2) A petition relating to an adopted county-wide planning policy shall be filed within sixty days of its adoption as specified in RCW 36.70A.210(6).

(3) A petition alleging that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted can be filed at any time.

~~(4) For all other matters, a petition must be filed with the board within sixty days of the final written decision, order, determination, publication, or action being entered.~~

~~(4)(5)~~ A petition relating to the failure of a state agency, city or county to take an action by a deadline specified in the act may be brought at any time after the deadline for action has passed.

**Statutory Authority:** RCW 36.70A.290(2), .210(6)

**COMMENT:** One practitioner suggested that a “failure to act” or a “failure to amend” claim should be subject to a time limit, for example, 360 days after the statutory deadline.

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242-02-230

Filing and Service of Petition for review — ~~Service and filing.~~

**COMMENT:** This section and the following have been re-organized to differentiate filing and service of the PFR from filing and service of all other papers.

~~(1) At least one copy of the petition for review shall be filed with the board by electronic mail, as provided in WAC 242-02-240, unless a petitioner does not have the technological capacity to do so. The original and four copies of the petition for review shall be filed with the board personally, or by first class, certified, or registered mail. Filings may also be made with the board by telefacsimile transmission as provided in WAC 242-02-240. A copy of the petition for review shall be personally served upon all other named parties or deposited in the mail and postmarked on or before the date filed with the board. When a county is a party, the county auditor shall be served in noncharter counties and the agent designated by the legislative authority in charter counties. The mayor, city manager, or city clerk shall be served when a city is a party. When the state of Washington is a party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law. Proof of service may be filed with the board pursuant to WAC 242-02-340.~~

~~(2) The board may dismiss a case for failure to substantially comply with subsection (1) of this section.~~

(1) The petition for review shall be filed with the board by electronic mail, unless the petitioner does not have the technological capacity to do so. Filings may also be made with the board by telefacsimile transmission as provided in WAC 242-02-240. The date of filing shall be the date of actual receipt by the board at its office during business hours. The date stamp placed on the petition shall be presumptive evidence of the date of receipt.

(2) The original and four copies of the petition for review, with attachments, shall also be filed with the board personally, or by first class, certified, or registered mail deposited in the mail within the timeline fixed in the statute.

(3) A copy of the petition for review shall be personally service on the named respondent party or parties or deposited in the mail and postmarked on or before the date filed with the board. When the county is the respondent party, the petition for review shall be served on the county auditor in noncharter counties and on the agent designated by the legislative authority in charter counties. When a city is the responding party, the mayor, city manager, or city clerk shall be served. When the State of Washington is a responding party, the office of the attorney general shall be served at its main office in Olympia unless service upon the state is otherwise provided by law.

(4) Proof of service shall be filed with the board pursuant to WAC 242-02-245[proposed].

(5) The board shall dismiss a case for failure to substantially comply with subsection (3) of this section.

**COMMENT:** Should the rules be updated to reflect common terminology – “Fax” and not “telefacsimile”? Proposed Section 5 is based on prior WAC 242-02-230(2) which said that the Board “MAY” dismiss; however, based on comments from practitioners that were interviewed, virtually all agreed that timely service on the respondent is jurisdictional but with an allowance for substantial compliance.

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## 242-02-240

### Date of filing — Facsimile and electronic mail. Filing and service of all other papers

**COMMENT:** This section incorporates existing WAC 242-02-310 to -340

(1) The date of filing shall be the date of actual receipt by the board at its office. The date stamp placed on the petition shall be presumptive evidence of the date of receipt.

(2) Filing of any documents with the board by electronic mail or telefacsimile transmission is at the risk of the sender and shall not be deemed complete unless the following procedures are strictly observed:

———— (a) An electronic mail or telefacsimile document will only be stamped “received” by the board between the hours of 8:00 a.m. and 5:00 p.m. excluding Saturdays, Sundays, and legal holidays. Any transmission not completed before 5:00 p.m. will be stamped received on the following business day. The date and time indicated by the board’s telefacsimile machine or receiving computer shall be presumptive evidence of the date and time of receipt of transmission.

———— (b) The original document and four copies shall be mailed and postmarked or otherwise transmitted to the board on or before the date of sending the telefacsimile transmission or electronic mail.

———— (c) Documents over fifteen pages in length may not be filed by telefacsimile without prior approval of the presiding officer.

(3) A telefacsimile or electronic mail copy shall constitute an original solely for the purpose of establishing the date a document was filed.

(1) Pleadings and briefs filed with the board subsequent to the original petition shall be by electronic mail unless the party does not have the technological capacity to do so. Filing may also be made personally, by first class, registered or certified mail or by telefacsimile transmission. If filing is by electronic mail or facsimile, an original and four copies shall be properly addressed to the board, deposited in the mail, and postmarked no later than the same day. Exhibits shall not be filed electronically but shall be deemed timely filed if included in the mailed copies.

**OPTION A:** (2) Papers required to be filed with the board shall be deemed filed upon actual receipt during office hours at the board’s office. An electronic mail or telefacsimile document will only be stamped “received” by the board between the hours of 8:00 a.m. and 5:00 p.m. excluding Saturday, Sunday, and legal holidays. Any transmission not completed before 5:00 pm will be stamped received on the following business day. The date and time indicated by the board’s telefacsimile machine or receiving computer shall be presumptive evidence of the date and time of receipt of transmission.

OPTION B: (2) In the absence of substantial prejudice, error in electronic service is not grounds for rejecting a filing. The date and time indicated by the sender's computer shall be presumptive evidence of the time of filing and service.

OPTION A: (3) A party filing pleadings, briefs, exhibits and other papers with the board shall also serve copies upon all other parties no later than the date on which they were filed with the board. Service is accomplished when the document is deposited in the mail and postmarked by the required date, or, by agreement among the parties, when the document is transmitted electronically.

OPTION B: (3) A party filing pleadings, briefs, exhibits and other papers with the board shall also serve copies upon all other parties no later than the date on which they were filed with the board. Service is accomplished when the document is transmitted electronically, or, by agreement of the parties, when the document is deposited in the mail and postmarked by the required date. Parties served shall be those included on the declaration of service list attached to the board's prehearing order, or amended order. Service upon a party's attorney or designated representative shall be considered valid service for all purposes upon the party represented.

**Statutory Authority: Subsection 3 – RCW 34.05.437(3)**

**COMMENT:** Stakeholders wanted the section on filing and service to be more concise, less repetitive, and clearly distinguish between the timeliness requirement for the PFR and all subsequent filings. This proposed language combines a number of sections of the existing rules. Another option not presented is to break this rule down into smaller segments if that would be more acceptable. In later sections of the rules, redundant requirements about serving all parties and providing a certificate of service have been deleted .

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## NEW SECTION 242-02-XXX [potentially -245]

### Declaration of service

**COMMENT:** This section incorporates existing WAC 242-02-340

A party filing any pleadings, briefs, exhibits, or documents with the board shall provide a signed declaration of service, on penalty of perjury under the laws of this state, stating that copies have been served on all other parties, listing the parties, and stating the method of service.

**Statutory Authority: RCW 34.05.437(3)**

## 242-02-250

### Notice of appearance ~~and answer.~~

~~(1) The respondent shall file and serve a notice of appearance ~~with the board and serve a copy on the petitioner and all other parties promptly within seven days~~ after having been served with a petition for review. The notice of appearance shall be dated, signed and contain the respondent's address, telephone and fax numbers, and electronic mail address.~~

~~-(2) The respondent, at its option, may file an answer to the petition for review. The respondent shall file the original and four copies with the board and serve a copy on the petitioner. Answers shall be filed no later than twenty days from the date of service of the petition for review. Answers shall be verified in the same manner as the petition for review.~~

**COMMENT:** Rules for signature, filing, and service are provided in WAC 242-02-124 and -240, so this section is redundant and capable of deletion/modification. Most practitioners agree that provision for an Answer is unnecessary and just generates extra paperwork. One suggestion was to develop a rule that if a city/county filed an answer, it would cut off the petitioner's right to amend the PFR. This may be a useful provision if the Answer was sufficiently specific. But, the board would mostly get *pro forma* answers that deny all of the petitioners' allegations and reserve the right to raise all possible defenses. Thus, the language related to answers has been deleted.

242-02-255

### Governor certified standing.

If the board receives a request for governor certified standing from a petitioner pursuant to RCW 36.70A.280 (2)(c), the board shall immediately forward the petitioner's request to the governor. The board shall indicate to the governor the end of the sixty-day time period within which the determination of standing must be made. Pendency of a request for governor certified standing does not extend the time for filing a petition for review.

Statutory authority: RCW 36.70A.280(2)(c)

**COMMENT:** This provision in the GMA is problematic because the PFR filing deadline will usually occur before the determination of standing. At worst, depending on when the request is made, the Prehearing Conference might be held before the governor responds. One practitioner suggested clarifying this procedure with 2-3 bulleted steps. However, the board has rarely gotten this request and, it seems unproductive to try to make specific procedural rules for so infrequent of an occurrence.

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242-02-260

### Amendment~~s~~ to petition~~s~~ for review ~~and answers~~.

**OPTION A:** (1) A petition for review ~~or answer~~ may be amended as a matter of right until thirty days after its date of filing. provided, however, any such amendments shall be limited to amending the legal bases for challenging the matters raised in the original petition.

**OPTION B:** (1) A petition for review ~~or answer~~ may be amended as a matter of right until thirty days after its date of filing. The amendment may amend the legal bases for the appeal but may not challenge the ordinance with respect to new matters not raised in the petition.

(2) Thereafter any amendments shall be requested in writing by motion, and will be made only after approval by the ~~board or~~ presiding officer. Amendments shall not be freely granted and may be denied upon a showing by the adverse party of unreasonable and unavoidable hardship, or by the ~~board's presiding officer's~~ finding that granting the same would adversely impact the board's ability to meet the time requirements of RCW 36.70A.300 for issuing a final order. The board may, upon motion of a party or upon its own motion, require a more complete statement of the nature of the claim or defense or any other matter stated in a pleading.

**OPTION A:** (3) The presiding officer may, upon motion of a party or upon its own motion, require a more complete statement of the issues presented for resolution by the board.

**OPTION B:** (3) The presiding officer may summarize and group legal issues and provide section headings for convenience of the parties and the board..

**COMMENT:** Does the time for amendment – 30 days – need to be changed? Practitioners discussed whether the Board could potentially get cases moving sooner. However, some petitioners' representatives say that they need access to the Record to determine their legal issues and that sometimes this takes up to a month. Similarly, respondents said they need 30 days to complete the Index of the Record. Accordingly, these rules retain the 30-day target for a Prehearing Conference.

In addition, does the Board need to clarify that amendments may be allowed for legal issues but that an attack on a whole different aspect of the ordinance may be untimely? Is there a way to state this clearly?

Subsection (3) presents options for addressing the board's authority to require redrafting of the legal issues. Should the board undertake the revision/reordering of the issues to make its decision-making more efficient? There was much discussion and varied opinions amongst practitioners, but the bottom line is that the legal issues belong to petitioners.

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242-02-270

### Intervention.



(1) Upon timely motion, any person may request status as an intervenor in a case. The motion shall state the applicant's interests relating to the subject of the action, how disposition of the action may impair that interest, and whether that interest is adequately represented by existing parties. The motion shall specify the legal issue(s) in the case which the intervenor seeks to address. The applicant shall make an effort to contact the parties so that the motion may be filed without objection. The motion to intervene shall be filed at least 10 days prior to the deadline for filing the petitioner's prehearing brief, unless good cause is shown.

(2) In determining whether a person qualifies as an intervenor, the presiding officer shall apply any applicable provisions of law and may consider the applicable superior court civil rules (CR) of this state. The granting of intervention must be in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

(3) If the person qualifies for intervention, the presiding officer may impose conditions upon the intervenor's participation in proceedings, either at the time that intervention is granted or at any subsequent time. Conditions may include:

(a) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest as demonstrated by the motion;

~~(b) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and~~

~~(b)(e) Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings, or requiring intervenor to combine its argument with the party whose position the intervenor supports, and~~

~~(c) Limiting the intervenor's role in settlement proceedings.~~

(4) The presiding officer shall timely grant or deny each motion and specify conditions, if any.

(5) Pleadings and briefs of an intervenor shall be filed and served in accordance with the deadlines applicable to~~concurrently with pleadings and briefs of~~ the party whose position the intervenor supports, in accordance with the board's order on intervention.

#### Statutory Authority: RCW 34.05.443

**COMMENT:** Several practitioners requested a rule on timeliness of intervention and indicated the importance of knowing who the parties are prior to the briefing on the merits. The proposed amendments reflect a 10 day period prior to the filing of the first prehearing brief; is this a reasonable deadline? Should the rules specify that an intervenor is a party of record for all purposes?

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242-02-280

Amicus.

(1) Any person whose interest may be substantially affected by a proceeding before the board may, by motion, request status as an amicus in the case. A motion and amicus brief shall be filed no later than 30 days before the hearing on the matter, unless good cause is shown.

(2) A motion to file an amicus curiae brief must include a statement of:

(a) Applicant's interest and the person or group applicant represents;

(b) Applicant's familiarity with the issues involved in the matter and with the scope of the argument presented or to be presented by the parties;

(c) Specific issues to which the amicus curiae brief will be directed; and

(d) Applicant's reason for believing that additional argument is necessary on these specific issues. The brief of amicus curiae may be filed with the motion but must be filed no later than the time set for the filing of the brief for the party whose position the amicus supports.

~~(3) If the person qualifies for amicus, the presiding officer may impose conditions upon the amicus's participation in the proceedings, either at the time that amicus status is granted or at any subsequent time. If leave to file an amicus brief is granted, amicus does not participate in oral argument, except at the request of the board, and is not a party of record in subsequent proceedings.~~

Authority: RAP 10.6

**COMMENT:** Practitioners were virtually unanimous that amicus is not entitled to participate in oral argument and is not a party of record in subsequent proceedings. Again, a proposed deadline for filing an amicus brief is provided.

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242-02-290

Direct review by superior court — Procedures.

**COMMENT:** WAC 242-02-290, -292, and -295 are an elaborate set of procedures for something that is allowed by the GMA (RCW 36.70A.295) but has rarely, if ever, happened. Therefore, consolidation of these three WAC procedure into a single rule is proposed.

RCW 36.70A.295 provides for direct review by superior court of a petition for review filed with the board if all parties to the proceeding agree to direct review in superior court and file an agreement in writing with the board within ten days after the petition for review is filed, or if multiple petitions have been filed and consolidated, within ten days after the board serves notice of consolidation.

(1) A direct review agreement of the parties shall contain:

(a) A caption in the following form:

BEFORE THE . . . GROWTH MANAGEMENT

HEARINGS BOARD

STATE OF WASHINGTON

<u>Petitioner,</u>	<u>Case No.</u>
<u>v.</u>	
<u>Respondent</u>	<u>Agreement for Direct</u> <u>Review</u>
	<u>by . . . County Superior</u> <u>Court</u>

(b) Numbered paragraphs stating:

(i) Petitioner's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other designated representative, if any;

(ii) Respondent's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other designated representative, if any;

(iii) Intervenor's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other designated representative, if any;

(iv) A statement indicating agreement to seek direct review by superior court of the petition for review filed with the board, citing case name and number as assigned by the board. The statement shall include agreement to proper venue, and may include other terms;

(v) Date the petition for review was filed, or if multiple petitions were filed and consolidated, the date the board served notice of consolidation;

\_\_\_\_\_ (vi) A statement that all parties have read the agreement for direct review by superior court, and agree to its terms, followed by the signatures of all the parties or the signatures of the attorneys or other designated representatives, if any.

\_\_\_\_\_ (2) One copy of the filed petition for review, with the case name, number and date stamp shall be filed with the agreement for direct review by superior court.

\_\_\_\_\_ (3) Within ten days of receiving the timely and complete agreement of the parties, the board shall file a certificate of agreement with the designated superior court with the documents required by RCW 36.70A.295(2) and shall serve the parties with copies of the certificate.

RCW 36.70A.295 provides for direct review by superior court of a petition for review filed with the board if:

\_\_\_\_\_ (1) All parties to the board proceeding agree to direct review by superior court;

\_\_\_\_\_ (2) The parties file a direct review agreement, signed by all parties, or their designated representatives, with the board;

\_\_\_\_\_ (3) The direct review agreement includes agreement to proper venue; and

\_\_\_\_\_ (4) The direct review agreement is filed with the board within ten days after the petition for review is filed, or if multiple petitions have been filed and the board has consolidated the petitions, within ten days after the board serves notice of consolidation.

[Statutory Authority: RCW 36.70A.270(7); 10-21-058, § 242-02-290, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(7); 98-01-144, § 242-02-290, filed 12/19/97, effective 1/20/98.]

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## 242-02-292 [Incorporated in -290]

### Direct review by superior court — Agreement of the parties.

—(1) A direct review agreement of the parties shall contain:

—(a) A caption in the following form:

BEFORE THE . . . GROWTH MANAGEMENT  
HEARINGS BOARD  
STATE OF WASHINGTON

<u>_____</u> Petitioner,	<u>_____</u> Case No.
<u>_____</u> v.	
<u>_____</u> Respondent	Agreement for Direct Review
	by . . . County Superior Court

—(b) Numbered paragraphs stating:

~~—(i) Petitioner's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other designated representative, if any;~~

~~—(ii) Respondent's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other designated representative, if any;~~

~~—(iii) Intervenor's name, mailing address, telephone number, and electronic mail address, and those of the attorney or other designated representative, if any;~~

~~—(iv) A statement indicating agreement to seek direct review by superior court of the petition for review filed with the board, citing case name and number as assigned by the board. The statement shall include agreement to proper venue, and may include other terms;~~

~~—(v) Date the petition for review was filed, or if multiple petitions were filed and consolidated, the date the board served notice of consolidation;~~

~~—(vi) A statement that all parties have read the agreement for direct review by superior court, and agree to its terms, followed by the signatures of all the parties or the signatures of the attorneys or other designated representatives, if any;~~

~~—(2) One copy of the filed petition for review, with the case name, number and date stamp shall be filed with the agreement for direct review by superior court.~~

[Statutory Authority: RCW 36.70A.270(7). 09-23-009, § 242-02-292, filed 11/5/09, effective 12/6/09; 98-01-144, § 242-02-292, filed 12/19/97, effective 1/20/98.]

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## 242-02-295 [Incorporated in -290]

### Board filing with superior court—Certificate of agreement.

~~—(1) Within ten days of receiving a timely, complete and signed agreement for direct review by superior court, the board shall file a certificate of agreement, signed by the presiding officer or the board, with the designated superior court and serve the parties with copies of the certificate of agreement.~~

~~—(2) The following documents shall be filed with the certificate of agreement:~~

~~—(a) The executed agreement for direct review by superior court;~~

~~—(b) The petition for review;~~

~~—(c) Any orders entered by the board;~~

~~—(d) Any other documents filed with the board regarding the petition for review.~~

[Statutory Authority: RCW 36.70A.270(7). 98-01-144, § 242-02-295, filed 12/19/97, effective 1/20/98.]

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**COMMENT:** WAC 242-02-310, -320, -330, and -340 have been consolidated within WAC 242-02-240; thus, they are deleted in their entirety.

## 242-02-310

### Service of papers. [Incorporated in -240]

~~(1) Parties filing pleadings, briefs, exhibits and other documents or papers with the board shall also serve copies upon all other parties no later than the date upon which they were filed with the board. Parties served shall be~~

those included on the declaration of service list attached to the board's prehearing order, or amended prehearing order.

(2) Service upon a party's attorney or other authorized representative shall be considered valid service for all purposes upon the party represented.

(3) Final decisions of the board shall be served upon the parties and their attorney or representative of record, if any.

[Statutory Authority: RCW ~~36.70A.270~~(7). 10-21-058, § 242-02-310, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW ~~36.70A.270~~(7). 04-21-046, § 242-02-310, filed 10/15/04, effective 11/15/04; 97-04-008, § 242-02-310, filed 1/24/97, effective 3/1/97. Statutory Authority: RCW ~~36.70A.270~~(6). 94-07-033, § 242-02-310, filed 3/9/94, effective 4/9/94; 92-21-034, § 242-02-310, filed 10/15/92, effective 10/15/92.]

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## 242-02-320

### Method of service. [Incorporated in -240]

Service of papers, specified in WAC 242-02-310(1), shall be made by electronic mail unless the party does not have the technological capacity to do so. Service may also be made personally, by first class, registered or certified mail, or by telefacsimile transmission. If service is by electronic mail or telefacsimile, an original and four copies shall be properly addressed to the board, deposited in the mail, and postmarked no later than the same day. Exhibits shall not be served electronically but shall be deemed timely filed if included in the mailed copies.

[Statutory Authority: RCW ~~36.70A.270~~(7). 10-21-058, § 242-02-320, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW ~~36.70A.270~~(7). 09-23-009, § 242-02-320, filed 11/5/09, effective 12/6/09; 08-10-029, § 242-02-320, filed 4/28/08, effective 5/29/08; 04-21-046, § 242-02-320, filed 10/15/04, effective 11/15/04. Statutory Authority: RCW ~~36.70A.270~~(6). 94-07-033, § 242-02-320, filed 3/9/94, effective 4/9/94; 92-21-034, § 242-02-320, filed 10/15/92, effective 10/15/92.]

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## 242-02-330

### Service of papers — When complete. [Incorporated in -240]

(1) Papers required to be filed with the board shall be deemed filed upon actual receipt during office hours at the board's office.

(2) All facsimile and electronic mail transmissions are sent at the risk of the sender and only pursuant to the procedures specified in WAC 242-02-240.—

(3) This section shall not extend any applicable time for appeal to the board nor extend the time for providing notice of appeal to any named party.

[Statutory Authority: RCW ~~36.70A.270~~(7). 10-21-058, § 242-02-330, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW ~~36.70A.270~~(7). 09-23-009, § 242-02-330, filed 11/5/09, effective 12/6/09. Statutory Authority: RCW ~~36.70A.270~~(6). 94-07-033, § 242-02-330, filed 3/9/94, effective 4/9/94; 92-21-034, § 242-02-330, filed 10/15/92, effective 10/15/92.]

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## 242-02-340 [Restated in -245]

### Proof of service — Declaration.

Where proof of service is required by this chapter, by statute, or upon the board's request, filing the original document with the board and serving copies upon all attorneys or other authorized representatives of record and upon parties not represented together with one of the following documents shall constitute proof of service:

\_\_\_\_\_ (1) An acknowledgment of service;

\_\_\_\_\_ (2) A certificate that the person signing the certificate did on the date of the certificate serve the papers upon each party or the party's attorney or other authorized representative of record in the proceeding by delivering a copy thereof in person to the named individuals;

\_\_\_\_\_ (3) A certificate that the person signing the certificate did on the date of the certificate serve the papers upon all parties of record in the case by:

\_\_\_\_\_ (a) Mailing a copy, properly addressed with postage prepaid, to each party or that party's attorney or other authorized representative; or

\_\_\_\_\_ (b) Transmitting a copy by electronic mail or telefacsimile, and on the same day mailing a copy to each party in the case or that party's attorney, or other authorized representative; or

\_\_\_\_\_ (c) Depositing a copy, properly addressed with charges prepaid, with a commercial parcel delivery company or courier service.

[Statutory Authority: RCW 36.70A.270(7), 10-21-058, § 242-02-340, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(7), 09-23-009, § 242-02-340, filed 11/5/09, effective 12/6/09; 04-21-046, § 242-02-340, filed 10/15/04, effective 11/15/04. Statutory Authority: RCW 36.70A.270(6), 94-07-033, § 242-02-340, filed 3/9/94, effective 4/9/94; 92-21-034, § 242-02-340, filed 10/15/92, effective 10/15/92.]

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## DISCOVERY AND SUBPEONA-ADDITIONAL BOARD POWERS

**COMMENT:** This section is re-titled and retains WACs related to discovery and subpoenas. It also incorporates provisions for witnesses and hearing examiners. Although these provisions are rarely used by the board, they provide flexibility in a changing fiscal and organization environment. Practitioners were generally supportive of this approach.

### 242-02-410

#### Discovery — Limitation.

(1) Because the board bases its decision on the record developed by the city, county, or the state in taking the challenged action, dDiscovery shall not be permitted except in extraordinary circumstances upon an order of the board or its presiding officer.

(2) Insofar as applicable and not in conflict with this chapter, when discovery has been authorized by the board or presiding officer, the statutes and court rules regarding pretrial procedures in civil cases in superior courts of the state of Washington shall be used. Such statutes and rules shall include but shall not be limited to those rules pertaining to discovery of evidence by parties to civil actions.

**Statutory Authority: RCW 34.05.446(2)**

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### 242-02-420

#### Subpoena — Issuance.

(1) Because the board bases its decision on the record developed by the city, county, or the state in taking the challenged action, subpoenas shall not be authorized except in extraordinary circumstances. When allowed by the presiding officer, sSubpoenas shall be issued and enforced, and witness fees paid, as provided in RCW 34.05.446 and court rules.

(2) Every subpoena shall identify the party causing its issuance. Subpoenas may be issued by the board or by an attorney of record. The person issuing shall sign the subpoena. Parties desiring subpoenas to be signed by the board shall make a showing of relevance and reasonable scope of the testimony or evidence sought and shall prepare the subpoenas for issuance, send them to the board's office for signature, and, upon return, shall make arrangements for service.

Statutory Authority: RCW 34.05.446

#### NEW SECTION

242-02-XXX [potentially –430]

#### Hearing examiner – may be appointed

(1) The board may appoint hearing examiners to assist the board in its hearing function, to make conclusions of law and findings of fact, and, if requested by the board, to make recommendations to the board for decisions in cases before the board. The findings and conclusions of the hearing examiner shall not become final until they have been formally approved by the panel hearing the case.

Statutory Authority: RCW 36.70A.270(5)

**COMMENT:** The 2010 GMA revisions make it unlikely that a hearing examiner would be appointed or could serve as a presiding officer, as the presiding officer is required to be a board member who resides in the region from which the case has arisen.

#### NEW SECTION

242-02-XXX [potentially -440]

#### Witnesses and Testimony

(1) Because the board bases its decision on the record developed by the city, county, or the state in taking the challenged action, witnesses shall not be permitted to testify in hearings before the board except upon an order of the presiding officer.

(2) All testimony shall be given under oath as provided in RCW 5.28. Where an interpreter is employed, the provisions of WAC 10-08-150 shall apply.

Statutory Authority: RCW 34.05.446

**COMMENT:** Practitioners almost uniformly advised against deleting all references to witnesses and testimony. Practitioners believed that the board needs to at least have the option of receiving and testing factual testimony. Several practitioners noted that if jurisdictions advance the “any evidence” argument from *Arlington v. CPSGMHB*, the board must be empowered to inquire into the validity of the evidence.

#### NEW SECTION

242-02-XXX [potentially -450]

#### Board consultation of critical areas expert

(1) Pursuant to RCW 36.70A.172(2) the board may retain scientific or other expert advice to assist in reviewing a petition that involves critical areas. When the board has determined that such advice is necessary or will be of substantial assistance in reaching its decision, the board shall promptly notify the parties of the proposed scope of the consultation.

(2) Upon receiving the report of the consulted expert, the board shall provide all parties a copy of the report, or if the consultation was oral, with a summary of the results and a statement of the expert's qualifications.

(3) Any party may, within 14 days, file objections to the qualifications or impartiality of the expert or to the substance of the report.

Statutory Authority: RCW 36.70A.172(2)

**COMMENT:** Under .172(2), the Board has the authority to consult an expert for scientific or other technical advice in a critical areas case. The Board needs a set of procedures that provides the parties an opportunity



to object to the expert's qualifications or rebut the expert's advice. The Board's expert consultant is not an "expert witness" providing testimony and subject to cross-examination but more like a court's "special master" providing specific analysis as an adjunct to the court.

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## PROCEDURES PRIOR TO HEARING

**COMMENT:** These sections were reordered so as to address (A) Notice of Hearing and assignment of Presiding Officer, (B) Prehearing Conference, (C) The Record, Exhibits, and Evidence, (D) Motions of various kinds, (E) Settlement extensions/continuances, and (F) Briefs.

242-02-510

### Notice of hearing — ~~Setting of time and place.~~

(1) Within ten days of the filing of a petition for review ~~or of the filing of the last-filed of consolidated petitions,~~ unless a petition for review has been removed to superior court, pursuant to WAC 242-02-290 through 242-02-295292, the board or presiding officer will issue a notice of hearing setting a preliminary schedule, including the a-hearing date for the hearing on the merits, and notify the parties of the date.

~~—————(2) The board or~~ presiding officer will thereafter schedule a place for the hearing.

~~(3) A written notice of the date and location of the hearing shall be sent to all parties not less than twenty days prior to the hearing date.~~

~~—————(4) (2) The notice of hearing shall identify the appeal to be heard, the names of the parties to the appeal and their attorneys or other authorized representatives, if any, and shall specify the time and place of hearing. The notice shall include the information specified in RCW 34.05.434 and if the hearing is to be conducted by teleconference call the notice shall so state.~~

~~—————(3) The notice of hearing will inform the parties of the presiding officer and panel members designated to hear the matter.~~

~~—————(4) The notice of hearing will include an order setting a date and time for a prehearing conference. If the prehearing conference is to be held by teleconference, the notice shall so state.~~

~~—————(5) The notice of hearing shall contain a tentative schedule for the case prepared by the presiding officer for review and finalization at the prehearing conference.~~

~~(5)(6) The notice shall state that if a limited-English-speaking or hearing impaired party or witness needs an interpreter, a qualified interpreter will be appointed and that there will be no cost to the party or witness. The notice shall include a form for a party to indicate if an interpreter is needed and identification of the primary language, or if a participant is hearing impaired.~~

~~(6) The notice may also include an order fixing the prehearing date and/or deadlines as provided in these rules.~~

~~—————(7) Defects in notice may be waived if the waiver is knowing and voluntary.~~

**Statutory Authority:** RCW 34.05.434

**COMMENT:** The notice of hearing provisions in the APA focus on notifying parties of the HOM. The Board's notice of hearing sets a preliminary date for the HOM but primarily sets the date for the prehearing conference, where the final case schedule is determined.

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242-02-520

### Index of the Record.

(1) Within thirty days of service of a petition for review, the respondent shall file with the board and serve a copy on the parties of an index listing of all material used in taking [related to] the action which is the subject of the petition

for review. The index shall contain sufficient identifying information to enable unique documents to be distinguished. ~~In addition, the written or tape recorded record of the legislative proceedings where action was taken shall be available to the parties for inspection.~~

~~(2) Concurrent with the filing of the Index, the respondent shall make all documents in the index reasonable available to the petitioners for inspection and copying. In addition, the written or tape recorded record of the legislative proceedings where action was taken shall be available to the parties for inspection. Respondents may charge for the cost of copies of documents requested by other parties in accordance with RCW 42.17.300, as amended.~~

~~(3) Within seven days after the filing of the index, any other party may file a list of proposed additions to the index. To the extent such documents were submitted to the jurisdiction or a part of the jurisdiction's proceedings prior to the challenged action, they are presumed admissible subject to relevance. If the respondent objects to any proposed addition, the petitioner may bring a motion to supplement the record.~~

Statutory authority: RCW 36.70A.290(4)

**COMMENT:** The board needs to clarify that the jurisdiction does not file the “whole” record, just a listing or “index” of the record. One practitioner recommend the US 9<sup>th</sup> Circuit’s model of requiring each party to provide an excerpt of the record as the documents its argument will rely on; this practitioner advocated filing this list early in the proceedings.

Section (1) presents a second option for word choice. Currently, WAC 242-02-520 states that the record is *all material used in taking the action*. This same language can be retained or replaced with *all material related to the action*.

Petitioners occasionally complain of difficulty accessing the respondent’s documents for review. The rules should clarify Respondent’s responsibility to make the documents available without discovery or public records requests. Does the board need to establish a time parameter [during regular business hours, etc]? Should our rules be more specific about how to identify documents in the Index?

The Board must base its decision on the record before the local government. However, the action being appealed is a legislative action of the city/county, so it involves the broad legislative knowledge and policy of the decision-makers; it is not a quasi-judicial action on a closed record. Further, the GMA requires consistency among all parts of the comprehensive plan and between the plan and development regulations, so broad areas of city policy may be relevant. Some respondents present a very narrow index to the record; the Board should accept other documents that were before the jurisdiction, or the minutes of other city/county meetings, for example, if relevance is shown. Most practitioners agree that matters presented to the local government are admissible and should be included in the index or added without objection. The Board will of course reject documents submitted in another procedure if the petitioner is simply trying to make a collateral attack on past actions of the jurisdiction where challenge would now be untimely.

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242-02-52001  
Exhibits.

~~—(1)—Except as otherwise provided in these rules, the evidence in a case shall consist of [the board shall base its decision on] the exhibits cited in the briefs and attached thereto. A copy of any document cited in a brief shall be served on the opposing party or parties by the time specified by the board or presiding officer and an original and four copies of the exhibits shall be filed with the board. Exhibits shall be drawn from the documents listed in the index, unless a motion to supplement the record has been granted. A party may submit additional documentary evidence at the time of hearing only upon a showing of good cause.~~

~~—(2)—Respondents may charge for the cost of copies of documents requested by other parties in accordance with RCW 42.17.300, as amended.~~

**COMMENT:** The entire record should not be sent to the board, only relevant documents and excerpts that must be attached to briefs as exhibits. Practitioners complained that board members sometimes go through and find their own information rather than relying on the parties to submit evidence. If parties may freely introduce new documents at a hearing, practitioners feel it is unfair to opposing parties who don’t know what to prepare for.

Deleted language eliminates redundancy as these requirements are stated elsewhere in the rules.

The opening sentence presents a second option for word choice. Currently, this WAC provision states that *the evidence in a case shall consist of the exhibits cited in the briefs*. This same language can be retained or replaced with *the board shall base its decision on the exhibits cited in the briefs*.

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## 242-02-52002 MOVED TO WAC 242-02-650

### Documentary evidence.

~~—(1) All rulings upon objections to the admissibility of evidence shall be made in accordance with the provisions of the Administrative Procedure Act and WAC 242-02-650.~~

~~—(2) Where applicable, the presiding officer may order:~~

~~—(a) That all documentary evidence which is to be offered during the hearing be submitted to the board and to other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence;~~

~~—(b) That documentary evidence not submitted as required in (a) of this subsection not be received in evidence in the absence of a clear showing that the offering party had good cause for the failure to produce the evidence sooner, unless it is submitted for impeachment or rebuttal purposes;~~

~~—(c) That all documents so presented and examined be deemed authentic unless written objection is filed within fourteen days after receipt. A party will be permitted to challenge such authenticity at a later time only upon a clear showing of good cause for failure to have filed such written objection.~~

~~—(3) The presiding officer may limit the documentary evidence to that identified on a preliminary, stipulated and/or final list of exhibits and/or to those exhibits cited in a brief. A party may submit additional documentary evidence at the time of hearing only upon a showing of good cause.~~

~~—(4) When only portions of a document are to be relied upon, the offering party shall adequately identify and prepare the pertinent excerpts and shall supply copies of such excerpts to the presiding officer and to the other parties. However, the whole of the original document shall be made available for examination and for use by all parties to the proceeding.~~

[Statutory Authority: RCW 36.70A.270(7); 97-04-008; § 242-02-52002, filed 1/24/97, effective 3/1/97.]

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## 242-02-521

### Designation of presiding officer and panel members.

The board administrative officer shall designate the presiding officer and panel members for each case at the time it issues its notice of hearing pursuant to WAC 242-02-510. In the event the presiding officer and any panel member subsequently changes, the board shall promptly notify the parties.

**Statutory authority: RCW 36.70A.260**

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## 242-02-522

### Presiding officer — Powers and duties.

It shall be the duty of the presiding officer to conduct conferences or hearings as directed by the board in an impartial and orderly manner. The presiding officer shall have the authority, subject to the other provisions of the act or these rules to:

(1) Inspect the petition for review to determine whether, on its face, compliance with the jurisdictional and standing requirements of the act is shown, and if compliance is not shown, to recommend an action or to refer the issue to the full board for resolution;

~~(2) Require that parties not represented by counsel designate a spokesperson(s) Take appropriate action with respect to the qualifications of the parties or the parties' attorney(s) or other authorized representative(s) to appear before the board;~~

(3) Administer oaths and affirmations if witnesses are permitted to testify; authorize discovery or issue subpoenas in exceptional circumstances as provided in RCW 34.05.446;

~~(4) Issue subpoenas as provided in RCW 34.05.446;~~

~~(4)(5) Rule on all procedural matters, objections and routine motions unless a board determination is required;~~

~~(5) Rule on all evidentiary matters including supplementation of the record offers of proof;~~

~~(7) When applicable, question witnesses called by the parties in an impartial manner as needed to develop any facts deemed necessary to fairly and adequately decide the issue;~~

~~(6) Decide motions for intervention, amicus, or compliance participant status; Issue orders joining other parties, on motion of any party, when it appears that such other parties may have an interest in, or may be affected by the case;~~

(79) Consolidate cases for hearing pursuant to RCW 36.70A.290(5) or coordinate cases pursuant to WAC 242-02-040 when such consolidation or coordination will expedite disposition and avoid duplication of evidence and argument; testimony and when consolidation will not unduly prejudice the rights of any party;

~~(8) Review cases for settlement or mediation opportunities and assist the parties in arranging such sessions; Hold conferences for the settlement or amplification of the issues;~~

~~(9) Conduct the prehearing conference, establish the case schedule, and r~~Regulate the course of the case;

~~(10) Encourage the parties to stipulate to the admissibility of documents in advance of a hearing and to rule on issues concerning the content of the record;~~

~~(11) Limit the length of a brief or impose format restrictions;~~

~~(14) Sign and file certificates of agreement acknowledging receipt of timely, complete, executed agreements for direct review by superior court;~~

(125) Rule on requests for settlement extensions;

~~(13) Waive any requirement of these rules unless a party shows that it would be prejudiced by such a waiver; and~~

(147) Take any other action necessary and authorized by these rules, the act, or the Administrative Procedure Act, chapter 34.05 RCW.

~~(15) Determine whether oral argument will be allowed on a motion and, if so, schedule the hearing; determine whether a conference or hearing shall be held by teleconference or in person;~~

~~(16) Require a party to provide a complete copy of the comprehensive plan, county-wide planning policy, or other core document germane to determination of the case.~~

**COMMENT:** The role of the presiding officer has evolved during the GMHB's tenure. This rule acknowledges in the first sentence that a primary role is to "conduct hearings". Another key function not reflected/listed in these rules is the drafting of all orders in a case. However, that is not a responsibility the board needs to include in the rules because the orders, properly signed, are valid whether drafted by the PO, another board member, or even staff under the board's guidance.

Several practitioners requested an option allowing the presiding officer, with the consent of the parties, to accelerate resolution of a case by hearing the dispositive motions and the merits concurrently on an expedited schedule.

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## NEW SECTION

242-02-XXX [Potential -523] [Based on existing 242-02-550]

### Prehearing conference - Purpose.

The purpose of a prehearing conference is to:

- \_\_\_\_\_ (1) Determine the feasibility of and encourage settlement of the matter or any portion thereof;
- \_\_\_\_\_ (2) Obtain a stipulation of relevant facts including the board's jurisdiction, the petitioner's standing in the matter, and the timeliness of the petition for review;
- \_\_\_\_\_ (3) Obtain agreement as to the issues of law and fact presented and their simplification, limitation, or resolution, so as to frame the final issues to be decided by the board;
- \_\_\_\_\_ (4) Rule on any pending matters of intervention, consolidation, or the qualification of individual board members or the composition of the panel;
- \_\_\_\_\_ (5) Determine the witnesses, if any, that may be allowed to be called by the parties;
- \_\_\_\_\_ (6) Set the final case schedule for filing motions, deadlines for briefing, and date and time of the hearing on the merits;
- \_\_\_\_\_ (7) Determine the approximate time necessary for the presentation of evidence and/or argument of the respective parties; and
- \_\_\_\_\_ (8) Obtain all other information which may aid in the prompt disposition of the matter.

**COMMENT:** Reference to the prehearing conference being optional is deleted as are detailed requirements about witness testimony.

## NEW SECTION

242-02-XXX [Potential -524] [Based on existing WAC 242-02-552]

### Prehearing conference — When held.

The prehearing conference will be held 30 days after the filing of the petition for review or as scheduled in the notice of hearing. The prehearing conference is conducted by the presiding officer and is ordinarily held telephonically.

**Statutory Authority:** RCW 35.04.431

**COMMENT:** As indicated, practitioners were asked whether the board should attempt to hold the PHC in 21 days, to get the case started more expeditiously, and a number of reasons were provided for continuing to schedule the PHC at approximately 30 days from receipt of PFR.

## NEW SECTION

WAC 242-02-XXX [Potential -525] [Based on existing WAC 242-02-558]

### Prehearing Order.

(1) Within seven days after the prehearing conference, the presiding officer shall issue a prehearing order memorializing rulings of the board at or prior to the prehearing conference, establishing the issues for resolution in the case, and setting the final case schedule for motions, briefing, and the hearing on the merits. The prehearing order may include:

- \_\_\_\_\_ (1) Admissions concerning jurisdiction, standing, or timeliness of the appeal;
- \_\_\_\_\_ (2) Provisions concerning the record, documents to be provided, witnesses allowed, if any, and authenticity and/or admissibility of exhibits;
- \_\_\_\_\_ (3) Limitations on length of briefs and the coordination of arguments from parties with related issues; or
- \_\_\_\_\_ (4) Any other matters that may expedite the resolution of the matter.

(2) Any objection to such order shall be made in writing within seven days after the date the order is dated. The prehearing order shall control ensuing proceedings unless modified for good cause by a subsequent order.

242-02-530

## Motions — General Requirements.

(1) A motion is an application for an order or ruling. Every motion shall be in writing, unless made during a hearing; shall state with particularity the grounds; and shall set forth the relief or order sought. ~~An original and four copies of the motion shall be filed with the board and a copy served on each opposing party or that party's attorney or other authorized representative.~~

~~(2) All motions shall be properly captioned and signed by the moving party or that party's attorney or other authorized representative.~~

~~\_\_\_\_\_ (3) The motion shall specify the amount of time required for argument, whether appearance by telecommunication is requested, and the names, telephone numbers, and electronic mail addresses of all parties served with the motion.~~

~~(4) Dispositive motions on a limited record, similar to a motion for summary judgment in superior court or a motion on the merits in the appellate courts, are permitted. Time frames for making and responding to such a motion shall be established by the presiding officer.~~

~~(5) Motions to disqualify a hearing examiner acting as the presiding officer, or a board member, for bias, prejudice, interest or other cause, with supporting affidavit(s), may be filed with the board.~~

~~(6) Any party may bring a motion for the board to decide a challenge to compliance with the notice and public participation requirements of the act raised in the petition for review, provided that the evidence relevant to the challenge is limited. If such a motion is timely brought, the presiding officer or the board shall determine whether to decide the notice and public participation issue(s) on motion or whether to continue those issues to the hearing on the merits.~~

(2) The deadline for filing certain motions is established in the prehearing order. No written motion may be filed after the date specified in the order without written permission of the presiding officer which may be granted for good cause shown.

(3) Unless the prehearing order or other order in the case establishes a different deadline, a party served with a motion shall have **[ten days]** **[five days]** from the date of service of the motion to respond to it. The board may allow the moving party to reply to the response.

(4) A party filing a motion on a routine matter is encouraged to inform other parties and to indicate in the motion whether it is filed with the concurrence of other parties.

(5) A motion on procedural matters will generally be decided by the presiding officer without a hearing.

(6) The presiding officer, taking into consideration the complexity and finality of the issues raised in the motion, may, in the officer's discretion, schedule a telephonic hearing for argument of the motion to the board or may defer consideration of the motion until commencement of the hearing on the merits.

**COMMENT:** This section combines language from existing WAC 242-02-530, -532, and -534.

Subsection (3) sets the time line for a response to a motion. The existing WAC provision allows a 10-day response period; practitioners noted that the superior courts require 5 days for routine motions. Does a 10 day response result in unnecessary delays, especially with routine procedural motions?

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## NEW SECTION

### WAC 242-02-XXX Dispositive Motions

(1) Dispositive motions on a limited record to determine the board's jurisdiction, the standing of a petitioner, or the timeliness of the petition are permitted. The board rarely entertains a motion for summary judgment except in a case of failure to act by a statutory deadline.

(2) Dispositive motions and responses shall be filed by the dates established in the prehearing order. The board may refuse to hear a motion that is not timely filed, except where good cause is shown.

(3) The presiding officer, taking into consideration the complexity and finality of the issues raised, may, in the officer's discretion, schedule a telephonic hearing for argument of the motion or may defer consideration of the motion until commencement of the hearing on the merits. Unless the matter is so deferred, the motion will be decided by the panel.

(4) Unless the order on dispositive motions is a final order pursuant to WAC 242-02-040(9), no motion for reconsideration will be allowed.

**COMMENT:** This new section incorporates portions of existing WAC 242-02-530 and 242-02-532

Only two of the interviewed practitioners suggested the board should consider "summary judgment" motions. Most agree that dispositive motions should be fairly narrowly defined and must be decided early in the proceedings or as soon as relevant facts are available.

It was pointed out that under LUPA, where the courts must decide land use cases on an expedited time line, defenses of lack of standing or failure of timely filing and service are deemed waived if not raised at an initial hearing no later than 50 days after the petition is served. RCW 36.70C.080(3). Should the Board's Rules establish that these defenses are deemed waived if not raised by the deadlines for dispositive motions established in the prehearing order?

Should *Res Judicata* be included?

## NEW SECTION

### WAC 242-02-XXX Dispositive Motion on Notice and Public Participation

Any party may bring a motion for the board to decide a challenge to compliance with the notice and public participation requirements of the act raised in the petition for review, provided that the evidence relevant to the challenge is limited. Such motion shall be filed by the deadline for dispositive motions established in the prehearing order. The presiding officer shall determine whether the panel will decide the notice and public participation issue(s) on motion or whether to continue those issues to the hearing on the merits.

**COMMENT:** This section incorporates existing WAC 242-02-530(6)

## NEW SECTION

### WAC 242-02-XXX Motion to Supplement the Record



Generally, the board will review only documents and exhibits taken from the record developed by the city, county, or state in taking the action that is the subject of review by the board and attached to the briefs of a party. A party by motion may request that the board allow the record to be supplemented with additional evidence. A motion to supplement the record shall be filed by the deadline established in the prehearing order, shall attach a copy of the document, and shall state the reasons why such evidence would be necessary or of substantial assistance to the board in reaching its decision. The presiding officer will decide the motion to supplement.

**COMMENT:** This section incorporates existing WAC 242-02-540.

## 242-02-532

### Motions — Time for filing and hearing. [Incorporated in -530]

~~(1) A motion can be filed at any time unless otherwise specified in these rules or by the board or presiding officer.~~

~~———— (2) After prehearing or other order. If a prehearing order or other order has been entered establishing a deadline for filing motions, no written motion may be filed after the date specified in the order without written permission of the board or presiding officer.~~

~~———— (3) The board or presiding officer, after taking into consideration when the motion was received and the complexity of the issues raised, may, in its discretion, schedule a hearing for argument of a motion at the time of a prehearing conference or at a separate hearing time, or may defer consideration of the motion until commencement of the hearing on the petition for review. The board or presiding officer may also limit argument on a motion to briefs.~~

~~———— (4) A motion, other than a dispositive motion or a motion to supplement the record, is deemed denied unless the board takes action within twenty days of filing of the motion.~~

[Statutory Authority: RCW 36.70A.270(7). 10-21-058, § 242-02-532, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(7); 97-04-008, § 242-02-532, filed 1/24/97, effective 3/1/97. Statutory Authority: RCW 36.70A.270(6). 92-21-034, § 242-02-532, filed 10/15/92, effective 10/15/92.]

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## 242-02-533

### Motion to disqualify for cause – Challenge to panel.

~~(1) A motion to disqualify a board member from serving on a panel or to challenge the composition of the panel or hearing examiner acting as the presiding officer, for any reason provided under chapter 34.05 RCW, with supporting affidavit(s), must be filed shall be brought at least seven days before the board holds a prehearing conference, or if facts establishing grounds for disqualification are subsequently discovered, promptly after discovery of such facts. In the event a new panel assignment is made during the course of the proceedings on a matter, any motion for disqualification or challenge to panel composition shall be brought no later than seven days after the board issues its notice of panel assignment.~~

~~(2) The board shall promptly rule upon such a motion. Any board member designated to serve on a panel is subject to disqualification for bias, prejudice, interest, or any other cause as provided in RCW 34.05.425. The board member whose disqualification is requested shall promptly determine whether to grant the motion, stating facts and reasons for the determination.~~

~~(3) If a party brings a motion challenging the composition of the panel for non-compliance with the requirements of RCW 36.70A.260, the presiding officer shall promptly forward the motion to the administrative officer who will prepare a response.~~

~~(34) If a motion for disqualification or challenge to composition of the panel is granted, the administrative officer will promptly make a new panel assignment and/or designate a new presiding officer. The parties will be informed at the prehearing conference and the resolution of the matter will be included in the prehearing order or other order of~~

~~the board issued within fourteen days of the filing of the motion, and a presiding officer was disqualified as a result, the board shall promptly designate a new presiding officer.~~

Statutory authority: RCW 34.05.425(3)-(7); 36.70A.270(8), 36.70A.260

**COMMENT:** These challenges – disqualification and panel composition – must be resolved (or be deemed waived) early in the proceeding so that the record is clear if the matter subsequently goes to court. One practitioner also noted the “necessity” consideration: generally, a judge whose presence is necessary to the adjudication will not be recused.

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## 242-02-534

Response to motions. [Incorporated in -530(3)]

~~(1) A party served with a motion shall have ten days from the date of service of the motion to respond to it, unless otherwise directed by the presiding officer. A response to the motion shall be filed with the board and a copy served on the opposing party/parties.~~

~~(2) The response shall specify the amount of time required for argument, whether appearance by telecommunication is requested, and the names, telephone numbers, and electronic mail addresses of all parties served with the response.~~

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## 242-02-540

~~New or supplemental evidence.~~

~~—Generally, the board will review only the record developed by the city, county, or state in taking the action that is the subject of review by the board. A party by motion may request that the board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons. The board may order, at any time, that new or supplemental evidence be provided.~~

**COMMENT:** This section was moved to align with WACs related to motions, a new WAC will be established – Motion to Supplement the Record

[Statutory Authority: RCW 36.70A.270(7); 10-21-058, § 242-02-540, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(7); 98-01-144, § 242-02-540, filed 12/19/97, effective 1/20/98. Statutory Authority: RCW 36.70A.270(6); 94-07-033, § 242-02-540, filed 3/9/94, effective 4/9/94; 92-21-034, § 242-02-540, filed 10/15/92, effective 10/15/92.]

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## 242-02-550 [Renumbered and relocated supra to potential WAC 242-02-523]

~~Prehearing conference.~~

~~A prehearing conference is optional at the discretion of the presiding officer. The purpose of a prehearing conference is to:~~

~~———(1) Determine the feasibility of and encourage settlement of the matter or any portion thereof;~~

~~———(2) Obtain a stipulation of relevant facts including the board's jurisdiction and the party's standing in the matter;~~

~~———(3) Obtain agreement as to the issues of law and fact presented and their simplification, limitation, or resolution;~~

- (4) Determine the qualifications of expert witnesses, if they are permitted to testify;
- (5) Receive any motions concerning qualification of individual board members to hear the matter;
- (6) Obtain information as to the number of expert and/or lay witnesses expected to be called by the parties and their names, addresses and telephone numbers;
- (7) Set subsequent deadlines, if and when appropriate, for filing final exhibit and witness lists, filing motions, and completing discovery; establish a briefing schedule, limit the length of briefs; and decide other matters related to the conduct of the hearing;
- (8) Determine the approximate time necessary for the presentation of evidence and/or argument of the respective parties; and
- (9) Obtain all other information which may aid in the prompt disposition of the matter.

**COMMENT:** Reference to the prehearing conference being optional is deleted as are detailed requirements about witness testimony.

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#### 242-02-552 [Renumbered and relocated supra to potential WAC 242-02-524 Prehearing conference — When held.

- (1) The board or presiding officer may order a prehearing conference on not less than seven days notice mailed to each party at a time and place fixed by the board or presiding officer.
- (2) At any time prior to a hearing on a petition for review, any party may file a written application with the board requesting a prehearing conference.

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#### 242-02-556 Prehearing conference — Failure to supply information.

If any party fails to supply the information reasonably necessary and required at the time of the prehearing conference, or as directed in a prehearing order, a board or presiding officer may subsequently limit the receipt of such party's evidence.

[Statutory Authority: RCW 36.70A.270(6); 92-21-034, § 242-02-556, filed 10/15/92, effective 10/15/92.]

**COMMENT:** How would this rule apply to Board proceedings? Thus, due to its inapplicability, it is proposed for deletion.

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#### 242-02-558 Prehearing conference — Agreements. [Renumbered and relocated supra to potential WAC 242-02-525]

At the conclusion of a prehearing conference, the presiding officer may require the parties to submit a proposed prehearing order. The presiding officer will issue an order reciting the action taken at the conference and any agreements of the parties or decisions of the presiding officer. The order may include provisions pertaining to:

- \_\_\_\_\_ (1) Jurisdiction and standing;
- \_\_\_\_\_ (2) Issues;
- \_\_\_\_\_ (3) Admissions;
- \_\_\_\_\_ (4) Witnesses, if permitted;
- \_\_\_\_\_ (5) Time, location and length of hearings;
- \_\_\_\_\_ (6) Authenticity and/or admissibility of exhibits;
- \_\_\_\_\_ (7) Qualification of witnesses, if permitted;
- \_\_\_\_\_ (8) Rulings of the board prior to the prehearing conference;
- \_\_\_\_\_ (9) Rulings of the presiding officer; and
- \_\_\_\_\_ (10) Any other matters that may expedite the hearing. Any objection to such order shall be made in writing within seven days after the date the order is dated. The board shall serve its prehearing order on the same day that the order is dated. The order shall control ensuing proceedings unless modified for good cause by a subsequent order.

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242-02-560

### Settlement extensions — ~~Continuances.~~

(1) If additional time is necessary to achieve settlement of a dispute that is an issue in a petition before the board, the board may extend the one hundred eighty-day time limit for issuing a final decision and order, as provided in RCW 36.70A.300 (2)(b). The ~~board~~ presiding officer may authorize one, or more, extensions of up to ninety days each.

(2) A request for a settlement extension must be filed with the board not later than seven days before the date scheduled for the hearing on the merits of the petition.

(3) The ~~board~~ presiding officer may grant a request for a settlement extension if:

- (a) The request was timely filed; and
- (b)(i) All parties named in the caption of the petition, agree to and sign the request; or
- (ii) A petitioner and respondent agree to and sign the request and the board determines that a negotiated settlement between the remaining parties could resolve significant issues in dispute.

~~(4) Continuances of hearings will be granted only on the board's initiative or upon timely request of a party setting forth in detail the reasons for such a request and a date by which such reason will no longer apply. The board will continue the matter only upon a finding of good cause and in order to prevent manifest injustice. The presiding officer may require status reports from the parties to determine whether progress is being made on resolving the dispute.~~

**Statutory Authority: RCW 36.70A.300(2)(b)**

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## NEW SECTION

242-02- XXX [Potentially assigned -565]

### Continuances

Continuance of a scheduled hearing will be granted only on the board's initiative or upon timely request of a party setting forth in detail the reason for such a request and a date by which such reason will no longer apply. The board will continue the matter only upon a finding of good cause. Continuance and rescheduling of a hearing on the merits or compliance hearing does not extend the statutory deadline for filing a final decision or for taking action to achieve compliance with the act.

**\*\*OPTIONAL\*\* NEW SECTION**

**242-02-XXX [Potentially assigned -566 ]**

**Motion to extend time for hearing and decision**

**→NO LANGUAGE PROPOSED AT THIS TIME**

**COMMENT:** Should the board's rules allow for the extension of the FDO deadline in extraordinary circumstances? Several practitioners requested consideration of a rule that would allow, upon agreement of the parties, a special motion to extend the time for hearing and decision in a case of unusual scope and complexity or in which a party is unavailable because of an emergency. This would allow time for an expert consultant in a critical areas case, for example, or for bifurcated hearings in a multi-party consolidated case. Is such a rule within the Board's statutory authority?

242-02-570

**Briefs.**

(1) A petitioner, or a moving party when a motion has been filed, shall submit a brief on-addressing each legal issue it expects the board to determine. Failure by such a party to brief an issue shall constitute abandonment of the unbrieffed issue. Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order ~~if one has been entered.~~

~~(2) The original and four copies of briefs and exhibits not previously filed with the board in the pending case and that are cited in the brief shall be filed with the board at least five business days prior to the hearing unless otherwise provided by the board or presiding officer. When briefs and exhibits are filed, a copy shall also be served on each party, unless otherwise directed by the board or presiding officer. The board or presiding officer may permit or require the filing of additional briefs. Briefs shall be filed according to the schedule in the prehearing order or any subsequent order amending the briefing schedule.~~

(3) Clarity and brevity are expected to assist the board in meeting its statutorily imposed time limits. A presiding officer may limit the length of a brief and impose format restrictions.

**COMMENT:** This provision is amended to refer to schedule in Prehearing Order or any subsequent order that amends the briefing schedule. Original language of Subsection (2) has been addressed in Service/Filing WACs.

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242-02-580

**Stipulation to the facts.**

Parties are encouraged to stipulate to any undisputed facts.

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242-02-582

**Waiver of parties' appearance.**

~~Upon stipulation by all parties, or upon order of the board, a matter may be submitted to the board or presiding officer without oral argument or appearance. The board or presiding officer, in its discretion, may require appearance for oral argument.~~

[Statutory Authority: RCW 36.70A.270(7). 10-21-058, § 242-02-582, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(6). 02-21-034, § 242-02-582, filed 10/15/92, effective 10/15/92.]

**COMMENT:** With WAC rules related to motions, the board established that it may decide a motion on the briefs, without appearance for oral argument, or may schedule a hearing (usually telephonic) for argument

on the motion. Thus, this section is redundant.

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## HEARING PROCEDURE

### 242-02-610

#### Hearing — Testimony under oath — Interpreters.

~~(1) All testimony to be considered by the board or presiding officer shall be sworn, and each person shall swear or affirm that the testimony to be given shall be the truth, the whole truth, and nothing but the truth, or according to the provisions of RCW 5.28.020 through 5.28.060.~~

~~—————(2) Every interpreter shall, before beginning to interpret, take an oath that a true interpretation will be made to the person being examined of all the proceedings in a language or in a manner which the person understands, and that the interpreter will repeat the statements of the person being examined to the presiding officer, in the English language, to the best of the interpreter's skill and judgment.~~

**COMMENT:** These provisions have been incorporated within proposed new WAC 242-02-440

~~[Statutory Authority: RCW 36.70A.270(7). 10-21-058, § 242-02-610, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(6). 92-21-034, § 242-02-610, filed 10/15/92, effective 10/15/92.]~~

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### 242-02-612

#### Hearing — Interpreters.

~~—The provisions of WAC 10-08-150 are incorporated by reference herein.~~

**COMMENT:** The board has included language within proposed new WAC 242-02-440 to address interpreters.

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### 242-02-620

#### Hearing — Reporting — Recording — Recording devices.

(1) All hearings shall be officially recorded by manual, electronic, or other type of recording device.

(2) Photographic and recording equipment of others shall be permitted at hearings; however, the presiding officer may impose such conditions upon their use as deemed necessary to prevent disruption of the hearing, or when a statute or common law limits such use.

**Statutory Authority:** RCW 35.04.449(4)

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**COMMENT:** WAC 242-02-630, -632, and -634 are deleted in their entirety. These are not rules of procedure but statutory standards for presumption, burden of proof, and standard of review.

### 242-02-630

#### Presumption of validity.

~~—Comprehensive plans and development regulations and any subsequent amendments adopted under the act are presumed valid upon adoption.~~

~~[Statutory Authority: RCW 36.70A.270(6). 92-21-034, § 242-02-630, filed 10/15/92, effective 10/15/92.]~~

## 242-02-632

### Burden of proof.

~~—(1) Except as provided in subsection (2) of this section, the burden of proof shall be on the petitioner to show that respondent's action or failure to act is not in compliance with the requirements of the act.~~

~~—(2) A county or city subject to a determination of invalidity made under RCW 36.70A.302 has the burden of demonstrating that the legislation it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of the act.~~

[Statutory Authority: RCW 36.70A.270(7). 98-01-144, § 242-02-632, filed 12/19/97, effective 1/20/98. Statutory Authority: RCW 36.70A.270(6). 92-21-034, § 242-02-632, filed 10/15/92, effective 10/15/92.]

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## 242-02-634

### Standard of proof.

~~Where a petition for review alleges a lack of compliance with the Growth Management Act, the board shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of the act.~~

[Statutory Authority: RCW 36.70A.270(7). 10-21-058, § 242-02-634, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(7). 98-01-144, § 242-02-634, filed 12/19/97, effective 1/20/98. Statutory Authority: RCW 36.70A.270(6). 92-21-034, § 242-02-634, filed 10/15/92, effective 10/15/92.]

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## 242-02-640

### Hearing — Procedures at hearing.

~~(1) Purpose. The purpose of any hearing is for the parties to present oral argument based on the record as presented in their briefs and exhibits.~~

~~(2) Presiding officer. All hearings shall be conducted by a presiding officer who shall conduct the hearing in an orderly manner and rule on all procedural matters, objections, and motions.~~

~~(23) Order of presentation. The presiding officer shall determine the proper order of presentation and, after consultation with the parties, shall determine the time allotted for presentation, including the role of intervenor(s), if any.~~

~~(3) Opening statements. Unless the presiding officer rules otherwise, parties may present oral opening statements setting out briefly a statement of the basic facts and issues of the case.~~

~~(4) Objections. Objection to the admission or exclusion of evidence shall state briefly the legal ground of objection.~~

~~—(5) Rulings. The presiding officer, on objection or on his/her own motion, shall exclude all irrelevant or unduly repetitious evidence. All rulings upon objections to the admissibility of evidence shall be made in accordance with WAC 242-02-650.~~

~~(6) Time. The presiding officer, after consultation with the parties, shall determine the time allotted for presentation.~~

~~(4) Illustrative exhibits. Any proposed illustrative exhibit shall be circulated to the parties at least four days prior to the hearing. Paper copies, in pleading size, shall be brought to the hearing for the benefit of the board and the parties.~~

~~(57) Supplemental evidence submitted at hearing. In exceptional circumstance and in the interest of justice, t~~The board may allow the submission of supplemental evidence at a hearing in response to board questions, upon a showing that the supplemental evidence is necessary or of substantial assistance to the board. If supplemental evidence is thereby introduced, the opposing party shall have the opportunity to respond. The board may require the parties to submit posthearing briefing or documents detailing the supplemental evidence, and the opposing party's



rebuttal to the supplemental evidence.

**COMMENT:** Sections related to opening statements, objections, rulings, and time are unnecessary or redundant. Some have been addressed within the WAC dealing with the Presiding Officer's duties (e.g. ruling on objections) while others, such as time, are now incorporated in amended section (3). Amendatory language related to supplemental evidence at the hearing is for clarity that this is an exception to the board's procedures.

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242-02-650

Rules of evidence — ~~Admissibility criteria.~~ [Incorporates 242-02-52002]

(1) All relevant evidence, including hearsay evidence, is admissible if, in the opinion of the presiding officer, the offered evidence is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. ~~The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state.~~ The presiding officer shall exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(2) The board's experience, technical knowledge, competency, and specialized knowledge may be used in evaluation of evidence.

**OPTION A:** (3) If not inconsistent with subsection (1) of this section, the presiding officer ~~may~~ shall refer to, but shall not be bound by, the Washington rules of evidence.

**OPTION B:** ~~Delete subsection (3) in its entirety.~~

(4) Documentary evidence may be submitted in the form of copies or excerpts, or by incorporation by reference, ~~subject to the following:-~~

~~(a) All rulings upon objections to the admissibility of evidence shall be made in accordance with the provisions of the Administrative Procedure Act and WAC 242-02-650.~~

~~(b) Where applicable, or when the presiding officer has ruled that supplementary evidence will be allowed, the presiding officer may order:~~

~~(i) That all documentary evidence which is to be offered during the hearing be submitted to the board and to other parties with their briefs;~~

~~(ii) That documentary evidence not submitted as required in (i) of this subsection not be received in evidence in the absence of a clear showing that the offering party had good cause for the failure to produce the evidence sooner, unless it is submitted for impeachment or rebuttal purposes;~~

~~(iii) That all documents so presented and examined be deemed authentic unless written objection is filed within ten days after receipt. A party will be permitted to challenge such authenticity at a later time only upon a clear showing of good cause.~~

~~(c) When only portions of a document or portions of a proceeding are to be relied upon, the offering party shall adequately identify and prepare the pertinent excerpts and shall supply copies of such excerpts for attachment as exhibits to a brief. However, the whole of the original document or recording shall be made available for examination and for use by all parties to the proceeding.~~

Statutory authority: 35.04.452(1), (2), (4); 35.04.461(4), (5)

**COMMENT:** Changes to Section (1) are because board cases do not deal with this. "Rules of Evidence" is not particularly appropriate for review of a record before a legislative body. Nevertheless, the board is required to find the facts, and subsections (1), (2), and (4) are taken directly from the APA and are applicable to board proceedings. Subsection 4 incorporates WAC 242-02-52002 .

Several practitioners cautioned that, while the board may apply its experience and technical expertise to the evaluation of evidence, board members must refrain from inserting their own facts/knowledge that may go beyond what has been established by the parties.

While the Board will not ordinarily take testimony at the hearing, it has been suggested that argument on behalf of a jurisdiction may be presented by a planner, rather than an attorney, provided that the presentation is from the record and does not involve new testimony.

Practitioners also discussed what constitutes expert testimony. Sometimes, attorneys and/or representatives of parties go beyond the record in presenting opinion that constitutes expert testimony.

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242-02-660

#### Official notice — Matters of law.

The board or presiding officer may officially notice:

(1) Federal law. The Constitution; congressional acts, resolutions, records, journals, and committee reports; decisions of federal courts and administrative agencies; executive orders and proclamations; and all rules, orders, and notices published in the Federal Register.

(2) Washington state law. The Constitution of the state of Washington; decisions of the state courts; acts, resolutions, records, journals, and committee reports of the legislature; decisions of administrative agencies of the state of Washington; executive orders and proclamations by the governor; all rules, orders, and notices filed with the code reviser; and codes or standards that have been adopted by an agency of this state or by a nationally recognized organization or association.

(3) Laws of other states. The constitutions of other states; decisions of state courts; acts, resolutions, records, journals and committee reports of other state legislatures; decisions of other states administrative agencies; executive orders and proclamations issued by a governor of another state; and codes or standards that have been adopted by an agency of another state.

(4) Counties and cities. Ordinances, resolutions, and motions enacted by cities, counties, or other municipal subdivisions of the state of Washington, including adopted plans and regulations and administrative decisions.

(5) Federally recognized Indian tribes, Constitutions, ordinances, resolutions and motions enacted by federally recognized Indian tribes.

(6) Growth management hearings board. The pendency of, the issues and positions of the parties therein, the pleadings filed, and the disposition of any proceeding then pending before or theretofore concluded by the Board. Includes, oOrders and decisions of the board and the board's rules of practice and procedure.

**COMMENT:** Several practitioners noted the need to clarify that adopted plans and relevant administrative decisions as official governmental actions should be entitled to office notice.

Should the Board require a motion to supplement in order to consider such evidence?

Similarly, where the Board is dealing with a case that has a history of related petitioners/claims or a chain of compliance actions, the Board may need to take notice of prior proceedings, not just orders/decisions issued. But, is this a matter of law or fact – how it is classified would denote its location – WAC 242-02-660 or -670.

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242-02-670

#### Official notice — Material facts.

(1) In the absence of conflicting evidence, the board or presiding officer, upon request made before or during a hearing, may officially notice:

(a) Business customs. General customs and practices followed in the transaction of business.

(b2) Notorious facts. Facts so generally and widely known to all well-informed persons as not to be subject to reasonable dispute or specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including, but not exclusively, facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department, or agency.

(c3) Technical or scientific facts. Technical or scientific facts within the board's specialized knowledge.

(2)(4) Request. Any party may request, orally or in writing, that official notice be taken of a material fact. The board or presiding officer may take official notice of a material fact on its own initiative.

(3)(5) Notice. Parties shall be notified either before or during a hearing of the material fact(s) proposed to be officially noticed, and shall be afforded the opportunity to contest such facts and materials.

(4)(6) Statement of Official Notice.

(a) In determining whether to take official notice of material facts, the presiding officer may consult any source of pertinent information, whether or not furnished by any party and whether or not admissible under the rules of evidence.

(b) If official notice of a material fact is taken, it shall be clearly and precisely stated and made part of the record.

(c) Where a decision of the board rests in whole or in part upon official notice of a material fact, such fact shall be clearly and precisely stated in such decision.

**COMMENT: Practitioners pointed out that the subsections in this WAC were mis-numbered,**

242-02-680

Hearings — Board questions.

~~A hearing examiner or any~~ Any member of the ~~panel board~~ may, at any time during the hearing, ask clarifying questions as necessary to understand the evidence or argument.

**COMMENT: Several practitioners cautioned that the Board questions should not be allowed to construct a record of facts not presented by the parties.**

## DISPOSITION OF CASES PRIOR TO HEARING

### NEW SECTION

242-02-XXX [potentially -700 ]

#### Dismissal

An order of dismissal, upon stipulation, dispositive motion, or default, is decided by the panel hearing the case. If the order disposes of the entire case, it is a final order for the purposes of appeal.

242-02-710

~~Failure to attend — Default or dismissal — Setting aside.~~

(1) When a party to a proceeding has, after proper notice, failed to attend a hearing or any other matter before the board or presiding officer, or failed to file a prehearing brief, a motion for default or dismissal may be ~~sought~~brought by any party to the case or raised by the board upon its own motion or by a presiding officer. Any order granting the motion shall include a statement of the grounds for the order and shall be served upon all parties to the case.

(2) If the party in default is the respondent, the board may determine whether petitioner has made a prima facie case that overcomes the statutory presumption of validity such that, in absence of briefing and argument by respondent, the board's order of default should include a finding of non-compliance, specifying the grounds for the order.

OPTIONAL (3) Prior to entering an order of default, the board may use its subpoena powers to compel the attendance of the defaulting party. Alternatively, where the defaulting party is represented by an attorney and the Board has reason to believe the default is caused by recalcitrance or neglect of the attorney, the board may file a complaint under the RPCs.

(4) [Unless Option 3 is not used] (2) Within seven days after service of the default order or dismissal under subsection (1) or (2) of this section, the party against whom the order was entered may file a written objection requesting that the order be vacated and stating the specific grounds relied upon. The board may, for good cause, set aside an order of dismissal or default.

**Statutory Authority: RCW 35.04.440**

**COMMENT:** The language for (1) default and the (4) process for setting aside default comes directly from the APA – RCW 35.04.440. Instances of outright default in Board proceedings have been rare, but we need some provision in the rules. Proposed sections (2) and (3) recognize that a default order generally is a win for the challenged jurisdiction. In the rare case where it is the jurisdiction that has failed to attend or to file a prehearing brief, the board needs to clarify its powers to resolve the case. One practitioner noted that the local government should have the option of not defending a case.

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242-02-720

Dismissal of action.

(1) Any action ~~may~~ shall be dismissed by the board:

\_\_\_\_\_ (a) Upon petitioner's withdrawal of the petition for review, or

\_\_\_\_\_ (b) Upon stipulation for dismissal by petitioner(s) and respondent(s)

(2) Any action may be dismissed by the board:

\_\_\_\_\_ (1) When all parties stipulate;

\_\_\_\_\_ (2) Upon motion of the petitioner or respondent prior to the presentation of the respondent's case;

\_\_\_\_\_ (3) (a) Upon motion ~~by~~ of the respondent alleging that the petitioner has failed to prosecute the case, failed to comply with these rules, or failed to follow any order of the board; or

(4) (b) Upon the board's own motion for failure by the parties to comply with these rules or any order of the board.

**COMMENT:** Stakeholders suggest the board differentiate between “shall dismiss” and “may dismiss” provisions. Rule also clarifies that it is petitioner and respondent, not intervenor, that sign a stipulated dismissal.

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## NEW SECTION

242-02-XXX [Potentially -730]

### Motion to Withdraw

→ NO PROPOSED LANGUAGE

**COMMENT:** One practitioner proposed that the Board draft a rule clarifying that a party may “opt out” by filing a motion to withdraw, specifically in multi-party cases. Is such a rule necessary?

## DISPOSITION OF PETITIONS FOR REVIEW AFTER HEARING

242-02-810

## Presentation of post hearing matters.

Unless requested by or authorized by the board, no post hearing evidence, documents, briefs, or motions will be accepted. ~~The board may request submission of proposed findings of fact, conclusions of law, and final order from any or all parties.~~

**STATUTORY AUTHORITY: RCW 35.04.461(7)**

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242-02-830

## Final decision and order — Basis.

(1) When the hearing on the petition for review has been held and the record reviewed by a majority of the panel hearing the matter, a written final decision and order shall be issued that contains appropriate findings and conclusions, and articulates the basis for the final decision and order.

(2) The board will not issue advisory opinions on issues not presented to the board in the petition for review's statement of the issues, as modified by any prehearing order.

(3) Except as provided in RCW 36.70A.300 (2)(b) and WAC 242-02-560, the final decision and order shall be issued by the board within one hundred eighty days of receipt of the petition for review, or if multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. The order shall be served on each party of record.

**Statutory Authority: RCW 36.70A.270(6), .290(1), .300(2), 34.05.461(9)**

**COMMENT:** One practitioner suggested that the board rules include a section defining concurring and dissenting opinions. Another practitioner requested that the final decision always identify the attorneys representing the parties, similar to the courts.

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242-02-831

## Final decision and order — Compliance, noncompliance, invalidity.

(1) In its final decision and order, the board shall either:

(a) Find that the state agency, county or city is in compliance with the requirements of chapter 36.70A RCW, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) Find that the state agency, county or city is not in compliance with the requirements of chapter 36.70A RCW, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, in which case the board shall remand the matter to the state agency, county or city and ~~specify a time for compliance~~establish a compliance schedule as specified in RCW 36.70A.300(3)(b). ~~The period of remand shall extend to the date~~The board retains jurisdiction of the matter until the board issues its next order on compliance.

(2) In its final decision and order, the board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand;

(b) Includes in its final decision and order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of the act; and

(c) Specifies the part or parts, if applicable, of the plan or regulation that are determined to be invalid and the reasons for invalidity.

(3) The effect of a determination of invalidity is as set forth in RCW 36.70A.302.

**Statutory Authority: RCW 36.70A.300(3), .302**

**COMMENT:** This provision tracks the language of the GMA. Amendatory language in Section 1(b) is because there have apparently been lapses where a city/county claimed the board lost jurisdiction because the 180 day compliance period passed without a hearing or a board ruling.

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242-02-832

### Post-Decision Motions - Reconsideration.

(1) After issuance of a final decision any party may file a motion for reconsideration with the board in accordance with subsection (2) of this section. Such motion must be filed within ten days of service of the final decision. ~~The original and four copies of the motion for reconsideration shall be filed with the board. At the same time, copies shall be served on all parties of record.~~ Within ~~five-ten~~ days of filing the motion for reconsideration, a party may file an answer to the motion for reconsideration without direction or request from the board. The board may require other parties to supply an answer. ~~All answers to motions for reconsideration shall be served on all parties of record.~~

- (2) A motion for reconsideration shall be based on at least one of the following grounds:
- (a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;
  - (b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or
  - (c) Clerical mistakes in the final decision and order.

(3) In response to a motion for reconsideration, the board may deny the motion, modify its decision, or reopen the hearing. ~~The motion for reconsideration shall be disposed of by the same panel that entered the order, if reasonably available.~~ A motion is deemed denied, ~~if, unless the board takes action within twenty days of filing the motion for reconsideration is filed, the board does not either (a) dispose of the motion or (b) serve the parties with a written notice specifying the date by which it will act on the motion.~~ A board order on a motion for reconsideration is not subject to a motion for reconsideration.

~~(4) If a motion for reconsideration has been timely filed in accordance with these rules, the time for filing a petition for judicial review does not commence until the board disposes of the motion or it is deemed denied. A decision in response to the petition-motion for reconsideration shall constitute a final decision and order for purposes of judicial review. Copies of the final decision and order shall be served by the board on each party or the party's attorney or other authorized representative of record.~~

~~(5) No motion for reconsideration stays the effectiveness of the board's final decision and order.~~

Statutory authority: RCW 35.04.470

**COMMENT:** The requirements, timing, etc. of reconsideration are set out in the APA. Several practitioners complained of the tight APA timelines, and the Board agrees that more time is needed for response to the motion and for the board to respond. Should the board remove the "deemed denied" provision and simply require that the board issue a decision within 30 days or 45 days of filing?

Amendatory language of Section (3) is based on APA requirement.

Service and filing language was deleted because it is superfluous given the WAC provisions for these actions.

**SHOULD THE BOARD PROVIDE** language related solely to clerical/typographical mistakes? Proposed language is

Upon receipt of a letter from a party identifying typographical errors or clerical mistakes in a final order, the board may, without objection, issue a corrected order. The letter must be filed within the deadline for motions for reconsideration and should indicate that the sender has obtained the concurrence of other parties. Issuance of a corrected order does not extend the time for filing of a petition for judicial review.

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## NEW SECTION

### 242-02-XXX Post-Decision Motions – Reconsider Compliance Schedule

Where the board's order makes a finding of non-compliance and enters a schedule for the responding jurisdiction to achieve compliance, the respondent may file a motion for reconsideration requesting modification of the compliance schedule upon a showing of special complexity, specific hardship, or the need to coordinate the compliance action with other planning activities of the jurisdiction. The motion shall be filed and disposed of pursuant to WAC 242-02-832.

**COMMENT:** When the board issues an order setting a compliance schedule (FDO or Compliance Order), it may not be aware of local circumstances making the compliance process unusually complex. These matters should be brought to the board promptly and resolved in an amended order, if possible, rather than six months later when the board has entered finding of continuing non-compliance.

242-02-833

Invalidity—Hearing pursuant to motion to Post-Decision Motions - Clarify, modify or rescind ~~invalidity~~.

Where the board's final decision and order makes a determination of invalidity, and the city or county subject to the order has not yet enacted legislation in response to the board's order, the city or county may file a motion to clarify, modify or rescind invalidity. The motion and any response may be supported by evidence arising subsequent to adoption of the invalidated legislation. Pursuant to RCW 36.70A.302(6), the board shall expeditiously schedule a hearing on the motion. Not later than thirty days after the hearing on the motion, the board shall issue any supplemental order continuing, clarifying, modifying or rescinding invalidity based on information provided at the hearing. If a motion to clarify, modify or rescind a determination of invalidity order has been filed by a county or city subject to a determination of invalidity, pursuant to RCW 36.70A.302, and the jurisdiction has not enacted legislation in response to the board's remand order, the board shall schedule and conduct a hearing to address clarifying, modifying or rescinding the determination of invalidity. Within thirty days of the hearing the board shall continue, clarify, modify, or rescind the determination of invalidity. The board may rescind a determination of invalidity but find continuing noncompliance, in which case the board may establish a compliance schedule or new compliance date.

Statutory authority: RCW 36.70A.302(6)

**COMMENT:** The statute makes special provision for a motion to modify or rescind invalidity before the jurisdiction takes action toward compliance. Should the board require that this motion be filed on the same timeline as motions for reconsideration?

There should be provision for supplementation of the record with evidence of what has occurred since the enactment of the offending ordinance.

The next clause of RCW 36.70A.302(7) allows a motion to modify or rescind invalidity after a city/county has adopted new legislation to comply. Our rules should distinguish between these different provisions.  
See WAC 242-02-894.

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## NEW SECTION

### 242-02-XXX Stay

Three options are presented in regards to stays:

[Option A No stay] The board will not issue a stay of its proceedings or of the effectiveness of any order of the board. When a parallel matter or appeal of the board's order is pending before a court, the party may seek a stay from the court.



**Comment:** Some practitioners urge that only the court where an appeal is pending should decide whether the board's order is stayed. For a board to issue a stay under the usual criteria, the board would have to find a likelihood of success on the merits of the appeal or irreparable harm; obviously the board could not make such a finding.

[Option B No Pre-FDO stay.] The board will not stay its proceedings in the event the petitioner has filed a parallel appeal in court under LUPA or other statute. The board's statutory 180-day deadline for resolving the matter will only be stayed upon order of the court.

**Comment:** A few practitioners suggested some sort of "equitable tolling" might be appropriate to extend the FDO deadline in hardship cases or when a parallel LUPA appeal is pending in court. The board can find no statutory or case-law authority for tolling its 180-day deadline for decision.

[Option C – Post FDO Stay] The board may stay the effectiveness of a final order upon motion for stay filed within ten days of service of the final order.

A stay may be granted if the board finds:

- An appeal is pending [or will be filed] in court, the outcome of which may render the board's decision moot, and
- Delay in application of the board's order will not substantially harm the interest of other parties to the proceedings, and
- Delay in application of the board's order is not likely to result in actions that substantially interfere with the goals of the GMA, or
- The parties have agreed to halt implementation of the non-compliant ordinance and undertake no irreversible actions regarding the subject matter of the case during the pendency of the stay.

The board's order granting a stay will contain appropriate findings and conditions.

Authority RCW 34.05.467, RCW 34.05.550

**COMMENT:** The APA allows an agency to grant a stay of its final order "unless otherwise provided by statute or stated in the final order." RCW 34.05.467. Our GMA statute requires us to schedule compliance in 180 days, and promptly hold a compliance hearing and make a compliance order. Compliance hearings "shall be given the highest priority of business." So there is solid ground for saying implementation of the board's order is "otherwise provided by statute." This would support requiring the appealing party to *ask the court* for a stay.

The APA says the court "shall not grant" a stay of the board's order unless the applicant is likely to prevail and will suffer irreparable harm if the compliance goes forward while the court case is pending. RCW 34.05.550(3). The main argument posed by practitioners for not requiring appellants to seek a stay from the court is that court standards are too strict. Why should the board consider a stay of its own decision on standards any less strict than what a court would apply?

If the board does amend our rules to allow request for stays, the stay should be requested within 10 days of the FDO or compliance order. RCW 34.05.467. The board Rules should articulate criteria for granting a stay that are at least as strict as those applied by the court and that prevent the "irreparable harm" of action that further violates the GMA.

242-02-834

Publication of final decision and orders.

Copies of all final decisions and orders are available from the office of the growth management hearings board. The growth management hearings board's web site is [www.gmhb.wa.gov](http://www.gmhb.wa.gov). ~~Each board panel~~The board posts [final orders, compliance orders, and other decisions on its website within its individual portion of the web site](#) and maintains a digest of its decisions [by region](#).

**Statutory Authority RCW 36.70A.270(6), .270(7)**

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242-02-880

Transcripts [of hearing](#).

The following shall be the policy of the board with regard to transcription of the record [of a hearing on the merits or other hearing](#):

(1) The board, in its discretion, may at any time cause a transcript to be printed. Any person may obtain a copy upon payment of the reasonable costs thereof.

(2) In any case when the board shall not cause the transcript to be printed, it shall be the obligation of the party wishing a transcript, or portions of it, to assume the cost of producing it.

(3) When an appeal is taken from any final decision and order of a board to a reviewing court, the appealing party is responsible for ordering and paying for the transcript of the hearing.

**COMMENT:** We need to clarify that this only applies to the transcription of a board recorded hearing and not the Record developed by the local jurisdiction nor the whole record of the board's proceeding.

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242-02-890

Determination of noncompliance — Compliance schedule [and notice of compliance hearing](#).

~~(1) In those cases where the board, in a final order, has made a determination of non-compliance pursuant to RCW 36.70A.300(3)(b) finds that a state agency, county, or city is not in compliance with the requirements of the act, chapter 90.58 RCW as it relates to the adoption or amendment of shoreline master programs, or chapter 43.21C RCW as it relates to adoption of plans, development regulations, and amendments thereto, under RCW 36.70A.040 or chapter 90.58 RCW, the board shall remand the matter to the affected state agency, county, or city. The board's final decision and order shall specify a reasonable time not in excess of one hundred eighty days, or such longer time as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply. In its order the board shall establish a compliance schedule and may require periodic reports on the progress the jurisdiction is making toward compliance.~~

~~(2) The board's final decision and order shall specify a reasonable time not in excess of one hundred eighty days, or such longer time as determined by the board in cases of unusual scope or complexity, within which the state agency, county, or city shall comply. In its order the board shall establish a compliance schedule, including a schedule for briefing and hearing, and may require periodic reports on the progress the jurisdiction is making toward compliance.~~

~~(3) The compliance schedule in the board's order shall set a hearing date for the purpose of determining whether compliance has been achieved and shall constitute notice of the compliance hearing. The compliance hearing shall be given the highest priority of business.~~

**Statutory authority: RCW 36.70A.300(3)(b), .330(1)**

**COMMENT:** The proposed amendments here, and in subsequent sections, are primarily to reorganize existing sections.

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## **NEW SECTION**

### **242-02-XXX Compliance – Expedited Hearing**

[When a city or county has taken legislative action to comply with all or part of the board's order prior to the expiration of the time set for compliance, the city or county may file a motion requesting an expedited compliance hearing. The](#)

presiding officer shall promptly set a new hearing date and issue a notice establishing the time and place of the hearing and a briefing schedule.

**COMMENT:** The GMA provides for expedited compliance hearings when there has been a determination of invalidity and the city/county has taken action – 36.70A.330(1). The Board has generally allowed a city/county that has taken action to request an earlier hearing date, regardless of whether or not invalidity was imposed.

## 242-02-891

### Compliance — Notice of hearing.

~~(1) After the compliance deadline specified in the final decision and order passes, or at an earlier time upon the motion of a county or city subject to a determination of invalidity under RCW 36.70A.302, the board shall issue a notice of compliance hearing setting a hearing date for the purpose of determining whether compliance has been achieved. The compliance hearing shall be given the highest priority of business.~~

~~(2) The presiding officer shall set the format of the compliance hearing in the notice of compliance hearing. At the compliance hearing the presumption of validity and burden of proof are as set forth in WAC 242-02-630 and 242-02-632. The parties to the original case, and a person with standing to challenge the legislation enacted in response to the board's final decision and order, may participate in the compliance hearing. The notice of compliance hearing shall set the scope of, and procedures for participation.~~

[Statutory Authority: RCW 36.70A.270(7), 10-21-058, § 242-02-891, filed 10/15/10, effective 10/15/10; Statutory Authority: RCW 36.70A.270(7), 98-01-144, § 242-02-891, filed 12/19/97, effective 1/20/98.]

**COMMENT:** Section deleted in its entirety. Subsection (1) is addressed in 242-02-890(3) and Subsection (2) is included within 242-02-89201

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## NEW SECTION

### 242-02-XXX – Statement of action taken to comply – Compliance Index

On or before the date indicated in the compliance schedule, the city or county subject to an order of noncompliance shall file a brief indicating the legislation adopted or other action taken to comply with the board's order. A copy of the legislation or relevant portion shall be attached to the brief. The city or county shall also provide a compliance index [option A - listing all the material used subsequent to the remand in taking the action to comply] [option B- including the index from the original proceeding and a listing of all additional material used subsequent to the remand in taking the action to comply].

**COMMENT:** Can or must the compliance index include matters from the record before the remand period? Some practitioners urge a combined index, including the record from enactment of the original legislation. Others want only the post-remand record to be listed.

## 242-02-89201

### Intent to participate in compliance hearings. Compliance Participant

~~Any person eligible to participate in a compliance proceeding based upon his or her participation in the proceedings to enact legislation in response to the board's order shall abide by any briefing schedule set in the board's compliance order, as amended or extended, and provide the board and the parties of record with written notice of intent to participate no later than two weeks prior to the compliance hearing date set in that order.~~

~~(1) A person with standing to challenge legislation taken in response to the board's order may petition the board to be allowed to participate at the compliance hearing. The compliance participant shall file a motion to participate by the date indicated in the compliance schedule. The motion should indicate the basis of the person's standing pursuant to RCW 36.70A.330(2) and the person's interest in the matter. Participation in the compliance proceeding~~

shall be limited to matters about which the person testified in the proceedings below and to issues concerning compliance with the Board's prior order. The compliance participant shall abide by the briefing schedule set in the compliance schedule.

(2) A person who has participated in the proceedings of a local jurisdiction to enact legislation in response to the board's order and who seeks to raise new issues not a part of the compliance action, must file a new petition for review.

**OPTION A – (3)** A compliance participant is a party of record for all subsequent proceedings in the case.

**OPTION B – (3)** A compliance participant seeking to be a party to all subsequent proceedings in the matter shall so indicate by a motion to intervene.

**Statutory Authority: RCW 36.70A.330(2)**

**COMMENT:** Options A and B seek to address the question of whether a “Compliance Participant” is someone who makes an appearance only for a single hearing or is that person/entity a party of record for all subsequent proceedings?

Subsection (2) addresses the requirement for a new PFR to challenge matters unrelated to the issues on compliance.

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242-02-893

## Compliance — Hearing.

(1) Upon a motion of a party or participant, the board shall reconsider its final decision and order and decide, if no determination of invalidity had previously been made, whether one should now be made. The procedures at the compliance hearing shall be as set forth by the presiding officer, pursuant to WAC 242-02-891. After a compliance hearing, the board shall determine whether a state agency, county or city is in compliance with the requirements of the act as remanded in the final decision or order and any compliance schedule established by the board. The matter shall be heard and decided by the same panel that entered the final decision and order, if reasonably available.

(2) The evidence in a compliance hearing shall consist of the exhibits cited in the briefs submitted in the compliance proceeding and either attached to the briefs or specifically identified as exhibits submitted and attached to prior briefs filed in the same case number. The burden is on the petitioner to demonstrate that the action taken by the city or county is not in compliance with the board's order, except that a city or county subject to a determination of invalidity has the burden of demonstrating that the action taken will no longer substantially interfere with fulfillment of the goals of the act.

(3) When the basis for an order of non-compliance is the jurisdiction's failure to act or failure to revise, the only question before the board at the compliance hearing is whether the jurisdiction has taken the required action. Any challenge to the merits of the newly-enacted legislation must be asserted in a new petition for review.

(4) After a compliance hearing, the board shall determine whether a state agency, city or county is in compliance with the requirements of the act as remanded in the final decision and order. The board shall issue an order on compliance indicating its findings and conclusions. If the board finds continuing noncompliance, the board shall establish a new compliance schedule. The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

(5)(4) Upon motion of a party or participant, or on its own motion, if the board finds that the county or city continues to be in noncompliance with the act, the board shall decide, if no determination of invalidity had previously been made, whether one should now be made. The board shall state in its order the part or parts of the legislation invalidated and the facts and law on which the determination of invalidity is based.

**Statutory Authority; RCW 36.70A.330, .320**

**COMMENT:** One practitioner indicated that the Board's findings/conclusions in a compliance order need to be specific, though not necessarily numbered statements.

In subsection 3, this rule could, alternatively, state that the compliance hearing will also consider challenges to the GMA compliance of the enacted legislation.

242-02-894

Compliance — ~~Hearing pursuant to motion~~ — Rescinding invalidity after new legislation.

~~If a motion for a compliance hearing has been filed by a county or city subject to a determination of invalidity, pursuant to RCW 36.70A.330(1), and the jurisdiction has enacted legislation amending the invalidated plan, regulation or part thereof, the jurisdiction may move for a hearing to modify or rescind invalidity. Pursuant to RCW 36.70A.302(7), the board shall expeditiously schedule a hearing on the motion. Not later than 30 days after the hearing on the motion, the board shall schedule and conduct a hearing to address rescinding the determination of invalidity. Within forty-five days of the filing of the motion,~~ the board shall issue an order continuing, modifying, or rescinding the determination of invalidity depending upon whether the jurisdiction's legislative action has removed the basis for invalidity so that it no longer substantially interferes with the goals of the act. The board may rescind a determination of invalidity but find continuing noncompliance, in which case the board ~~may~~ shall establish a compliance schedule or new compliance date.

**Statutory Authority:** RCW 36.70A.302(7)

**COMMENT:** The original wording of this provisions paralleled 242-02-833, which is clearer, so that language was incorporated within the proposed amendments. Aligning the deadline for issuance of the order to the hearing date allows some flexibility in the event it takes longer/shorter time to convene the parties for the hearing and receive briefing.

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242-02-896

Continued noncompliance — Recommendation to the governor.

If the board finds that the county or city continues to be in noncompliance with the act, the board shall transmit its findings to the governor. The board may recommend that sanctions authorized by the act be imposed. A jurisdiction's efforts to meet a compliance schedule shall be considered by the board in making a recommendation on sanctions to the governor.

**Statutory Authority:** RCW 36.70A.330(3)

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242-02-898

Appeals of a board's final decision.

(1) Any party aggrieved by a final decision of the board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of service of the final decision of the board.

(2) The board shall follow the procedures established in RCW 34.05.518 in the event that direct appellate review is sought.

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242-02-899

Record on reviewAppeal.

The party seeking review should, within thirty days after the notice of appeal is filed, serve on all other parties and file with the board a designation of those documents that the party wants the board to transmit to the superior court. Each party is encouraged to designate only those documents needed to review the issues presented to the superior court.

**COMMENT:** We need language to clarify that cost of transcription of the board's recorded hearing and the cost of duplicating the certified records is borne by the appellant.

**NEW SECTION**

**242-02-XXX Certificate of Appealability**

Within thirty days of the filing of a petition for review in the superior court, a party may request a certificate of appealability for direct review by the court of appeals. If the issue on review is the jurisdiction of the board, the board

may file an application for direct review. Application for direct review of a decision of the board is governed by the procedures and criteria of RCW 35.04.518(3)-(6).

**Statutory Authority RCW 35.04.518(3) – (6).**

## **NEW SECTION**

### **242-02-XXX Procedure on Remand**

Upon remand of a decision from the court, the board shall, within 30 days, issue notice to the parties of a remand conference to determine any subsequent procedures necessary to implement the mandate of the court.

**COMMENT: Procedures on remand depend on the nature of the mandate and, sometimes, on the continuing availability of the parties. The mandate might require the board simply to enter a final order, or to remand the matter to the jurisdiction for compliance, or to schedule additional briefing and hearing. Convening the remand conference allows the board to determine next steps in resolving the matter.**

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